No. 14833

United States
Court of Appeals
for the Ninth Circuit.

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.–10-14-55

No. 14833

United States
Court of Appeals
for the Ninth Circuit.

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-14-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Attorneys, Names and Addresses of..... 1

Certificate of Clerk to Record on Appeal..... 103

Cost Bond on Appeal..... 101

Decision and Order..... 82

Memorandum Decision and Order Denying Motion to Reconsider and Dismissing Amended Petition 96

Motion to Reconsider and Amended Petition for Habeas Corpus..... 92

Notice of Appeal..... 100

Order for Transfer of All Exhibits to Court of Appeals 102

Petition for a Writ of Habeas Corpus..... 3

Ex. A—Transcript of Interviews, Motions, Affidavits, Etc. 28

NAMES AND ADDRESSES OF ATTORNEYS

Counsel for Appellant Kenneth Glen Madsen:

J. LAEL SIMMONS,
KENNETH DAVIS,
WILLIAM H. SIMMONS,
2101 Northern Life Tower,
Seattle 1, Washington.

Counsel for Appellees:

CHARLES P. MORIARTY and
EDWARD J. McCORMICK, JR.,
1012 U. S. Court House,
Seattle 4, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 149

KENNETH GLEN MADSEN,

Petitioner,

vs.

HAROLD H. HINSHAW the Sheriff of Skagit County, Washington, and WILLIAM B. PARSONS the United States Marshal for the Western District of Washington, Northern Division, and The Honorable HERBERT BROWNELL the Attorney General of the United States,

Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS

To: The District Court of the United States for the Western District of Washington, Northern Division.

Comes Now Kenneth Glen Madsen and respectfully petitions this Court for a Writ of Habeas Corpus, and alleges as follows:

I.

That petitioner is presently confined, imprisoned, detained and restrained of his liberty in the Skagit County Jail in Mount Vernon, Washington, as a Federal prisoner within the territorial jurisdiction of this Court, by Harold H. Hinshaw who is the

Sheriff of Skagit County, State of Washington, and who has the actual physical custody and control of petitioner, and by William B. Parsons who is the United States Marshal for the Western District of Washington, Northern Division, and who supervises the said Sheriff in regards to the custody and control of the petitioner, and by the Honorable Herbert Brownell, the Attorney General of the United States, who supervises the said Marshal.

II.

That said confinement, imprisonment, detention, and restraint is unlawful and illegal, and the unlawfulness and illegality thereof is more fully described in the facts hereinafter set forth.

III.

That, on or about August 6th, 1954, when petitioner was sixteen years old, he became involved in a happening at Ketchikan, Alaska, which resulted in his being incarcerated in the Ketchikan Federal jail, and petitioner has been, ever since said date, continuously incarcerated.

IV.

That, on or about October 25, 1954, petitioner was, as a result of the above-mentioned happening, indicted by a Grand Jury, sitting for the Federal District Court of Alaska, Division Number One at Ketchikan, being charged with the crime of First Degree Murder, which crime carries with it, unless qualified by the jury, a mandatory death penalty.

V.

That the charging part of the said indictment reads as follows:

No. 1652-KB

Indictment
Viol. Sec. 65-4-1 ACLA 1949
(Murder in the First Degree)

The Grand Jury Charges:

That on or about the 6th day of August, 1954, at Ward Cove, Ketchikan, Division Number One, Territory of Alaska, and within the jurisdiction of this Court, Kenneth Glen Madsen did, with Deliberate and premeditated malice, kill Raymond Tamatsu Aria by shooting the said Raymond Tamatsu Aria.

A True Bill.

STUART RUSSELL,
Foreman.

VI.

That as a result of the above-mentioned happening of August 6th, 1954, petitioner, without delay, employed competent counsel of his own choosing to represent him, and petitioner was continuously represented by such counsel for a period of approximately three months, and right up to the day petitioner's trial for First Degree Murder was to commence, that is, November 26th, 1954.

VII.

That petitioner's attorney was well qualified as a trial lawyer and wholly capable of adequately

representing petitioner. That petitioner's attorney had been actively engaged in the practice of law for twenty-eight years. That petitioner's attorney had, for a period of approximately three months, investigated and reinvestigated petitioner's case, had many times thoroughly retraced the exact steps and actions of all persons who were involved in any manner in the case, had taken meticulous notes concerning all things and matters relevant to the case, had taken complete and detailed statements from the witnesses, had caused a special home interview to be taken of one of the most highly qualified autopsy surgeons in the United States who had performed well over seven thousand autopsies and who had testified in courts many times as an expert witness in his field. In fact he had participated in over three hundred homicide cases as an expert witness, and as a result petitioner's attorney had secured invaluable medical information from said expert, wholly beneficial to petitioner. Said attorney had secured authoritative medical books from said expert's personal library to aid in properly and adequately preparing a physician in Alaska to testify on behalf of petitioner. That said information and books were transported to Alaska, and a qualified practicing physician in Alaska was, by their use, thoroughly prepared to testify on behalf of petitioner as an expert witness on an issue of vital importance to petitioner's defense. That petitioner's attorney had on several occasions discussed the case with the government attorneys in charge, he had read and studied all points of law which

might be involved in the case, he had prepared many skillfully drawn jury instructions and had prepared himself with authoritative cases to support the giving of the same; he had prepared an outline of trial procedure and tactics to be followed during the course of the trial. Petitioner's attorney was thoroughly and completely prepared to proceed to trial on petitioner's behalf, and pursuant to petitioner's wishes.

VIII.

That on November 26, 1954, without notice to petitioner or petitioner's attorney, petitioner was, by the District Court of Alaska, the Honorable George W. Folta presiding improperly, summarily, capriciously, and arbitrarily refused the right to be heard by his attorney. That petitioner did not learn that he was not going to be allowed to be represented by his attorney until the afternoon of November 26, 1954, when petitioner was taken before the Court for the sole purpose of trial, and it was not until then that petitioner was advised of the Court's action. As a result petitioner was bewildered and confused, and sick at heart, and when he sought the guiding hand of his attorney, who was present in the courtroom, the Court, without cause, refused him the right to even communicate with his attorney in any manner whatsoever. That, as a consequence of the Court's actions, petitioner was deprived of his unqualified right to be represented by counsel of his own choosing. Petitioner was thereby greatly prejudiced in the defense of his case, all in clear violation of petitioner's sub-

stantive rights, as provided by the juvenile laws of Alaska, and as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution. That the arbitrary acts of said Court in denying petitioner the assistance of counsel of his own choosing for his defense further violated petitioner's substantive rights as guaranteed by the Sixth Amendment to the United States Constitution. Therefore, the Court was, by its actions, completely deprived of jurisdiction over petitioner, if ever it had any.

IX.

That there is provided in Title 51 of the Alaska Compiled Laws Annotated, a certain chapter concerning juveniles, and designated as Chapter No. 3. That this chapter is divided into nineteen sections, numbering 1 to 19. That this chapter was the law of Alaska on August 6, 1954, and has been ever since that date. That the purpose of this chapter is set forth in Section 1, as follows:

"Purpose of Act. The purpose of this Act is to secure for each child such care and guidance as nearly as possible equivalent to that which should be given by his parents.

"The principle is hereby recognized that children under the jurisdiction of the court are wards of the Territory, subject to discipline and entitled to the protection of the Territory, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them."

That the construction to be placed on this chapter is set out in Section No. 2 as follows:

"Construction of Act. The Act shall be liberally construed to accomplish the purpose herein sought."

That jurisdiction over juveniles is set forth in Section 3 as follows:

"Jurisdiction. Jurisdiction in cases of children under 18 years of age shall be vested in the Justice Court, which shall have exclusive original jurisdiction in proceedings concerning any child residing in this Territory who (1) has violated any law of the United States or the Territory or any ordinance or regulation of a subdivision of the Territory; (2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; (3) is habitually truant from school or home, or habitually so deports himself as to injure or endanger the morals or health of himself or others; (4) is abandoned by his parent, guardian or custodian; (5) lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian; (6) associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others; (7) is mentally deficient or in need of special care or training provided his parent or guardian consents in writing that such child comes within the provisions of this Act.

"The Justice Court shall also have exclusive jurisdiction in any controversy arising over the custody of a child, and to appoint a guardian of the person and property of any child within its jurisdiction.

"Provided, that such jurisdiction provision shall not be applicable in divorce or separate maintenance cases arising in the District Court, but in such cases the District Judge may, if he deems it best for the welfare of a child involved, order the child turned over to the custody of the Welfare Department. In such event the Welfare Department shall receive such support money as is ordered to be paid by the court and use same to cary out suitable arrangements for the child."

That an investigation into a juvenile's background is required in every case coming before the Justice Court, and the procedure to be followed in connection therewith is set forth in Section 4, as follows:

"Procedure: Preliminary Investigation: Petition. Whenever any personal shall give to the court information that a child comes within the provisions of this Act, the court shall make inquiry to determine whether the interests of the public or the child require formal proceedings in the case. Such inquiry shall include a preliminary investigation of the home and environmental situation of the child, his previous history, and the circumstances of the condition alleged. The court shall have power to designate a competent person or agency to assist in

making the preliminary investigation. If after the completion of such inquiry the court shall determine that further proceedings should be had, it shall order that a petition be filed, alleging briefly the facts which bring said child within the provisions of this Act, and setting forth the name, birthplace, birthdate and residence of the child, the names and residences of his parents, or his legal guardian, and if there be none, the name of the person or persons having custody or control of the child, and the name of the nearest known relative if no parent or guardian can be found. If any of the facts herein required are not known by the petitioner, the petition shall so state. The petition shall be sworn to by the person or persons presenting same."

That Sections 5, 6, 7 and 8 prescribe that a hearing be held on the petition required to be filed by section 4, and also prescribe the procedure to be followed to initiate such a hearing. That section 9 prescribes the method by which the Justice Court may waive jurisdiction over a juvenile, and reads as follows:

"Waiver of Jurisdiction. If a child is charged with an offense which, if committed by an adult, would constitute a felony, the court after full investigation may waive the jurisdiction vested in it by this Act, and order such child held to await action by the grand jury; otherwise, the court shall proceed as herein provided."

That the method of conducting of the hearing contemplated by sections 5, 6, 7 and 8, and the judg-

ments or orders to be entered pursuant thereto, and other matters of a consequential concern to juveniles, are set forth in section 10, as follows:

"Hearing and Judgment or Order: The court may conduct the hearing in an informal manner in chambers or otherwise and may adjourn the hearing from time to time. In the hearing of any case, the public shall be excluded, but for good and sufficient reasons compatible with the best interests of the child, may permit others to be present.

"Proceedings under this Act shall be without jury and the rules of evidence may be relaxed.

"If the court shall find the child falls within any of the provisions of this Act, an order shall be duly entered:

"(1) Committing the child to the Territorial Department of Public Welfare; or

"(2) Releasing the child to the care and custody of the parent, guardian, or other suitable person, under the supervision of the Department of Public Welfare.

"No adjudication upon the status of any child shall operate to impose any of the civil disabilities imposed by conviction upon a criminal charge, nor shall any child be deemed a criminal by such adjudication, nor shall such adjudication be deemed a conviction, nor shall any child be charged with or convicted of a crime in any court, except as provided in Section 9 of this Act [§51-3-9 herein]. The

disposition of a child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceedings, nor shall such disposition or evidence operate to disqualify a child in any future civil service examination or appointment in the Territory.

"Upon entering an order of commitment the Court shall transmit a copy of its information and findings, together with the order of commitment to the Department of Public Welfare to which the child has been committed."

X.

That Chapter 3 of Title 51 of the Alaska Compiled Laws Annotated (1949) sets forth requirements concerning juveniles that are jurisdictional in nature; that full and complete strict compliance with the type of investigation and hearing therein prescribed is an indispensible prerequisite that must be followed by the Justice Court before it may waive jurisdiction over a juvenile. That perfect compliance with the methods prescribed for waiver of jurisdiction over a juvenile, by the Justice Court, is an indispensible prerequisite to any other court obtaining jurisdiction over a juvenile. That Petitioner has unlawfully been totally denied every and all rights guaranteed to him under the said Chapter 3, all to his extreme prejudice. That Petitioner has never, by word or action, waived any of the rights guaranteed to him under Chapter 3. That, even if Petitioner had desired to waive his rights under Chapter 3, it was not within his power to do so,

because, the rights guaranteed Petitioner, under Chapter 3, may not, under any circumstances, be waived by petitioner or anyone else including the courts of Alaska. That, as a result of petitioner being denied his rights as guaranteed by the said Chapter 3, the District Court of Alaska was without jurisdiction even to make the record under which petitioner is now committed to serve twenty-five years of his life in prison, and petitioner, as a consequence, has been illegally divested of his substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution.

XI.

That petitioner is now seventeen years old and has only an eighth-grade education. That after petitioner was placed in custody in Ketchikan, his mother went to the jail and asked to see him, but this request was arbitrarily and unjustly denied, and petitioner's mother thereafter passed away without being able to see petitioner. Petitioner's father was also arbitrarily and unjustly denied the right to see petitioner until after petitioner was committed to await action of the Grand Jury, on a charge of Murder in the First Degree. That petitioner has not committed and is not guilty of the crime of First Degree Murder or any crime lawfully included therein, or any crime at all. That no evidence exists which could establish that petitioner is guilty of having committed a crime. That, at a fair trial, petitioner could establish his innocence.

XII.

That petitioner in the midst of his perplexities sought a reasonable continuance in order that he might obtain another competent attorney of his own choosing to represent him, but petitioner's request was, by the Court, abruptly, unjustly, wrongfully, and against all American standards of fair-play dogmatically denied. The Court was thoroughly informed that petitioner could and would obtain counsel of his own choosing if given a reasonable opportunity to do so. That, as a result of these disconcerting actions of the Court, petitioner was elevated to the pinnacle of prejudice, and contrary to the spirit of the law and against public policy. Petitioner was unlawfully left to stand alone in a United States Court, to face immediate trial, without counsel of his own choosing, without guardian, and without next of friend, on a charge of Murder in the First Degree, in positive violation of petitioner's substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution, and in flagrant violation of petitioner's substantive right to have the assistance of counsel of his own choosing for his defense as guaranteed by the Sixth Amendment to the United States Constitution, and as a result, the Court, by operation of law, was severed of all jurisdiction, if it ever had any.

XIII.

That petitioner was compelled, against his will, pursuant to definite directions of the Court, to take

a pauper's oath, so that the Court might appoint counsel, not of petitioner's choosing, to represent petitioner. The Court had been fully advised that petitioner was capable of obtaining his own counsel, and petitioner knew, at the time he took this pauper's oath that, in so doing, he was acting under coercion and was swearing falsely and the Court also knew that the petitioner was committing a wrong, but the petitioner had no choice, because the Court would not alter its imperious attitude. This action, by the Court, was in direct violation of petitioner's substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution, and of petitioner's substantive right to be represented by counsel of his own choosing as guaranteed by the Sixth Amendment to the United States Constitution, and by this action the Court lost all jurisdiction in the case, if it ever had any.

XIV.

That the Court then proceeded, wholly against petitioner's wishes, to appoint counsel to represent him. That petitioner then requested of the Court that a certain attorney be appointed. That this certain attorney was formerly a U. S. District Attorney and was, beyond doubt, the best qualified attorney practicing criminal law in Ketchikan, Alaska. The Court inquired of this attorney and was informed by this attorney that the time allowed for preparation was too short and that this attorney did not know under such circumstances whether or not he could stand up under the physical strain,

although he informed the Court that it would be different if ample time were allowed. The Court again, without justification, refused to continue petitioner's case and proceeded against petitioner's wishes and appointed two unqualified, inadequate, inexperienced and incompetent young attorneys to represent petitioner. This was done in spite of the fact that these same two attorneys had, only minutes previously, stated in open Court, among other things, that they did not want to have anything to do with petitioner's case, and that in no event would they go to trial on petitioner's behalf, and that petitioner did not want them to have anything to do with his case. The Court ordered these two attorneys to be ready to go to trial within nine days. Petitioner was thereby effectively and unlawfully denied the right to employ competent counsel of his own choosing. These proceedings of the Court whereby these two attorneys were appointed to represent petitioner, were clearly prejudicial to petitioner and in violation of petitioner's plain wishes as stated in open court. Petitioner's substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution were thereby transgressed and petitioner's substantive right to be represented by competent counsel of his own choosing as guaranteed by the Sixth Amendment to the Constitution of the United States was effectively denied. The Court was thereby deprived of all jurisdiction, if it ever had any.

XV.

That these two Court-appointed attorneys sought to have the petitioner's case continued for a reasonable time in order that they might attempt to prepare themselves. The Court again, without just cause, arbitrarily denied this request. The Court then ordered these two attorneys not to communicate with petitioner's ousted attorney, and not to avail themselves of any of the products of his labor, and the Court then warned these two attorneys, that if they violated this order, they would be held in contempt of Court. This display by the Court was such a despotic misuse of judicial power that it deprived petitioner of a fair trial; and it was an open violation of petitioner's substantive rights as guaranteed under the due process clause of the Fifth Amendment to the United States Constitution, thereby depriving the Court of jurisdiction, if it ever had any.

XVI.

That these two court-appointed attorneys, although well-qualified to individually represent persons in trials in many different types of civil actions, were wholly inexperienced, incompetent and inadequate to represent petitioner in this trial on a charge of Murder in the First Degree, and the Court knew this. That due to their deficient qualifications and lack of experience in handling criminal cases and the fact that the Court would not allow them ample time to prepare, and since they were foreclosed from communicating with or using the material gathered by petitioner's ousted counsel,

they were forced to enter upon the trial of petitioner's cause unprepared. The unavoidable consequential result was that petitioner's trial attempt was a farce, sham, and a mockery of justice. In the preparation of petitioner's case and in the courtroom performance on behalf of petitioner, petitioner's court appointed counsel, fell below the very minimum standards required of an attorney defending a person charged with a capital offense. As a result of the incompetent and inadequate representation of petitioner by his court-appointed counsel, petitioner was effectively deprived of the substantive right of due process of law as guaranteed by the Fifth Amendment to the United States Constitution, and the court was thereby deprived of all jurisdiction, if it ever had any.

XVII.

That, of these two attorneys, the one with the wider experience told petitioner, just minutes before he was appointed to represent petitioner, that he did not want to handle petitioner's case, and that he was not qualified for a murder trial. Subsequent to his appointment he informed petitioner that he did not like the case but that he was "stuck" with it, that he did not want to go to trial on behalf of petitioner, that he was a civil lawyer and not a criminal lawyer, that if petitioner went to trial he would lose the case, that he didn't see how he could get petitioner off, that the most petitioner could hope for would be a verdict of guilty of Second Degree Murder and that he would get thirty years

on that, and petitioner would probably be convicted of First Degree Murder and would either get life imprisonment or would be sentenced to death. He also told petitioner that the prosecution's case was very strong and that petitioner's case was very weak. He advised and begged petitioner to plead guilty. He also advised petitioner that during the noon recess of petitioner's first day of trial, and before the jury had been selected, he had met Judge Folta on the street and that the Judge said: "Why don't you settle this?", to which petitioner's court-appointed counsel answered, "I would, but the District Attorney and I are a few years apart on the sentence," to which the Judge replied: "Well, unless you've got a case, I'd settle it, and I can't see where you have a case." Petitioner's court-appointed counsel told petitioner that if he went to trial he would absolutely get no less than thirty years, whereas if he pleaded guilty, he thought the Judge might bring the sentence down to fifteen years, because that was the impression the Judge gave petitioner's attorney on the street. That all of these statements and representations made to petitioner by his court-appointed counsel and all statements by the Judge to petitioner's court-appointed counsel were designed to coerce petitioner into pleading guilty against his will. Petitioner did not want to plead guilty, but he was in absolute ignorance of what was going on in connection with his trial, except of what his court-appointed counsel advised him. Petitioner was incapable, because of his incarceration youth, inexperience, and lack of

knowledge, of making an intelligent decision concerning his rights. Petitioner was incapable of protecting his own interests or of assuming legal obligations, or defending legal rights. Petitioner was unable to assert his rights through competent counsel of his own choosing and he was entirely unversed in the law, and unqualified and unable to represent himself in these criminal proceedings. Petitioner had no qualities of learning or experience calculated to enable him to protect himself in the give-and-take of a courtroom trial. As a natural result of this coercion and these improper inducements, petitioner was, through fear, misrepresentation, ignorance, lack of knowledge of our spoken language, lack of knowledge of the ways of judicial procedure, persuasion based on false statements, lack of comprehension of the consequences of his act, and youth, blindly led into entering a plea of guilty, if one was entered, to the crime of Second Degree Murder, although he was innocent, and petitioner was thereby deprived of his substantive right to a fair trial on the law and evidence, which was a denial to petitioner of his constitutional rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution, and the Court was thereby deprived of jurisdiction, if it ever had any.

XVIII.

Petitioner was, because of his incompetent and inadequate representation, unlawfully prevented from going to trial and presenting his valid defenses to a jury, all in violation of petitioner's substantive

rights as guaranteed under the due process clause of the Fifth Amendment to the United States Constitution, and the Court was thereby deprived of jurisdiction, if it ever had any.

XIX.

That the statute hereafter set out was the law of Alaska on August 6, 1954, and has been ever since, and may be found in the Alaska Compiled Laws Annotated, Title 66, Chapter 12, Section 3, as follows:

"Plea of Guilty: How Put In. That a plea of guilty must in all cases be put in by the defendant in person, in open court, unless upon an indictment against a corporation, in which case it may be put in by counsel."

XX.

That petitioner never withdrew his plea of not guilty, and it still stands valid, to the indictment charging him with First Degree Murder, leaving the issue of petitioner's guilt or innocence undetermined. That petitioner was never convicted of the crime of First Degree Murder, or any crime lawfully included therein. That petitioner never, in person, or otherwise, consciously or wittingly, entered a plea of guilty to the crime of First Degree Murder, or any other crime lawfully included within the crime of First Degree Murder. That petitioner never has entered a plea of guilty to the crime of Second Degree Murder. That the Court's jurisdiction, if it had any, was not such that it could lawfully adjudge petitioner guilty of any crime or

commit him to the custody of the United States Attorney General. Therefore, the judgment and commitment of the Court was entirely without its jurisdiction, if it had any, and is entirely unlawful and illegal, and petitioner now remains restrained, imprisoned, confined and detained of his liberty in complete violation of his substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution.

XXI.

That the Judgment and Commitment, under the authority of which the petitioner is now imprisoned as a Federal prisoner, is as follows:

In the District Court for the District of Alaska,
Division Number One at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KENNETH GLEN MADSEN,
Defendant.

JUDGMENT AND COMMITMENT

On this 7th day of December, 1954, came the attorney for the Government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been found guilty on his plea of Guilty to the crime of Second

Degree Murder, the same being an offense in violation of Section 65-4-3 ACLA 1949 and included in the crime of First Degree Murder as charged in the Indictment filed in the above-entitled case; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

It Is Adjudged that the defendant is Guilty of the crime of Second Degree Murder, the same being an offense included in the crime of First Degree Murder.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty-five (25) Years.

It Is Ordered that the Clerk of this Court deliver a certified copy of this judgment and commitment to the United States Marshal, the Superintendent of the Federal Jail, or other qualified officer and to the defendant and that the copies serve as the sentence of the defendant.

Done in open court this 7th day of December, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

XXII.

That petitioner has complied with Section 2255 of Title 28 of the United States Code Annotated,

in that he has twice sought relief under that section, by proper and adequate motion, through two different attorneys, but he has arbitrarily been denied the right to even be heard by the trial Court. That Section 2255 has been wholly inadequate and ineffective in petitioner's case. That other matters and circumstances exist which have rendered Section 2255 not only an extreme hardship to petitioner, but also totally ineffective. In fact Judge Folta has refused to permit petitioner's counsel Davis or Davidson to file his petition to vacate the plea of guilty.

XXIII.

That the only adequate and effective remedy now left to petitioner, by which he may correct the manifest injustice of his unlawful and illegal confinement, is Habeas Corpus as guaranteed petitioner by Article I, Section 9, of the United States Constitution. That petitioner is capable and ready and willing to present evidence to support the allegations in this petition. That petitioner has secured from the Clerk of the Alaska District Court a true and complete transcript of all proceedings in his case, and petitioner has secured from the official court reporter of the Alaska District Court a true and complete transcript of the record as it transpired, and petitioner is capable and ready and willing to offer these in evidence in further support of the allegations of this petition, and petitioner will file these with the Clerk of this Court, as exhibits, at the same time he files this petition.

XXIV.

That the futility of petitioner's efforts to obtain justice from the Alaska District Court, or relief under section 2255 of Title 28 U.S.C.A. and under Rule 32d F.R.C. are, to some degree, illustrated by the contents of exhibit "A" hereto attached and incorporated herein by this reference the same as though it were fully set forth in verbatim. That contained in exhibit "A" are the transcripts of interviews of Carl Tokunage and Donald Apa, the two most important government witnesses, which interviews contain all material matters to which they could testify in petitioner's case; exhibit "A" also contains a copy of petitioner's motion under section 2255, petitioner's motion for special setting of hearing, petitioner's affidavit in support of his motion under section 2255, petitioner's father's affidavit, and other matters of an important nature to petitioner's case.

Wherefore, petitioner prays that this Court issue an order directing the respondents to show cause, at a time and place certain, why the relief prayed for in this petition should not be granted, and that upon respondent's complying with said order and showing cause as directed, that this Court grant petitioner a speedy hearing upon the issues thereby presented and that petitioner be allowed to be present in person at said hearing and be allowed to introduce evidence on his behalf, and that this Court at the close of said hearing unconditionally release petitioner from the unlawful and illegal

confinement under which he is now being held a prisoner.

J. LAEL SIMMONS,
KENNETH DAVIS, and
WM. H. SIMMONS,
Attorneys for Petitioner.

State of Washington,
County of Skagit—ss.

Kenneth Glen Madsen, being first duly sworn on oath deposes and says:

That he is the Petitioner in the above-entitled cause; that he has read the within and foregoing Petition for Writ of Habeas Corpus, knows the contents thereof and believes the same to be true.

/s/ KENNETH GLEN MADSEN.

Subscribed and Sworn to before me this 13th day of April, 1955.

[Seal] /s/ WM. H. SIMMONS,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT "A"

Interview With Carl Tokunage, U. S. Coast Guard

12/1/54.

Q. How old are you? A. 20.

Q. How old were you at the time of the shooting?

A. 20.

Q. Where are you from? A. Honolulu.

Q. How long have you been in the service?

A. A year and a half.

Q. How long have you been here?

A. About 4 months.

Q. Did you know any of the other fellows before you came to Alaska? A. No.

Q. You met them all up here in the service?

A. Yes.

Q. Do you recall who purchased the whiskey you fellows had before you went out to Ward's Lake?

A. Mike, Don and Aria bought it.

Q. (D.A.): Who went and got it?

A. Apa bought one and Raymond and Mike went and bought the other. All different and separate times.

Q. Do you remember when Madsen came out to Ward's Cove turnaround?

A. It was about 1:00 or 12:00.

Q. Do you remember how much whiskey was left then? A. No.

Q. Did you talk to Madsen?

A. I don't remember. I don't recognize any of them.

Q. Did you strike any of them?

A. I hit two boys but I don't know which ones they were.

Q. Do you know why you hit them?

A. I don't remember what I hit them for. I hit them in the stomach.

Q. Did you actually level off at them or push them?

A. It was just a push with my left hand. I am right handed.

Q. (D.A.): Could you have hit just one boy?

A. I don't know.

Q. (CLC.): What was the size of the boy you hit, was he smaller or bigger?

A. The boy I hit was bigger.

Q. (D.A.): Blond? A. I don't know.

Q. (D.A.): Are you sure you hit two?

A. Yes, quite sure.

Q. (CLC.): Did you get in an argument?

A. We were arguing a little bit.

Q. Do you recall over what? A. No.

Q. Did you patch the quarrel up after you hit them?

A. I don't remember, but the boys told me I apologized.

Q. Were you pretty drunk?

A. Yes, I was feeling pretty good.

Q. Do you usually take a punch at somebody when you get to feeling pretty good? A. No.

Q. Have you done it before? A. No.

Q. The first time? A. Yes.

Q. Do you know how to drive, Carl?

A. Yes.

Q. As you recall, your condition, do you think you were too drunk to drive? A. Yes.

Q. As I recall, after Madsen left, everybody but Vera and Ray got in the car and left to go get another bottle. Is that what you recall?

A. I don't know.

Q. Then the car had motor trouble going up to the Pastime and came up Ward's Lake road and it stopped and wouldn't go any farther. Then Mike, Vera and Dick left. They left you, Billy, Ray and Don in the car. Do you remember?

A. No answer.

Q. What do you remember?

A. We stalled and we started the car and it wouldn't start and I remember Billy saying he was going out.

Q. (D.A.): Where did it stall? Was it near where Ray was killed? A. Yes.

Q. (D.A.): Who was behind the wheel?

A. I was.

Q. (CLC.): Were you driving?

A. No. We all tried to start the car and when they left I just stayed there asleep.

Q. After the car stalled and after the boys left did you get in the car and get behind the wheel?

A. No, I didn't drive.

Q. Do you recall how the car got in the ditch?

A. No.

Q. Between the time that Mike, Vera and Dick left the car and the time that Madsen apparently returned and shot Ray, what do you remember?

A. I remember some kind of noise outside and I

started to get up and saw somebody coming toward me and that is all I remember.

Q. Did you see anything about him?

A. I saw the shape of the fellow coming toward me.

Q. (D.A.): Did you hear anything?

A. Sound of noises.

Q. (D.A.): Did you hear a shot?

A. I heard something like a shot.

Note—I do not know who was asking all these questions here, CLC and the D.A. were asking them. The majority were asked by the D.A.

Q. (D.A.): Did you feel blows? A. Yes.

Q. (D.A.): When did you hear shots in proximity to the blows.

A. I heard the shot, I think, before he hit me. Then I got hit after the shot. But I am not sure whether it was a shot or not. It could have been a backfire or a door slamming but it sounded really loud. I heard a shot or the noise first before I got hit.

Q. (CLC.): After the three left did you talk to any of the fellows in the car?

A. I don't remember. I must have just slept. If I talked I don't remember.

Q. (CLC.): Do you remember if you got out of the car after it stalled and got back in?

A. I don't remember if I did.

Q. (CLC): Think back when is the last time that you can remember much of anything?

A. I remember going out and everything, and some parts.

Q. Do you remember much of what happened after you left Ward's Lake to go get another bottle?

A. I don't think we were after another bottle.

Q. Do you remember Billy trying to get you out of the car some time before you were hit?

Q. I think I got out of the car by myself. I was sitting in the car and I heard someone coming. I guess I passed out.

Q. Before you were hit, do you recall whether or not Billy tried to get you to leave the car?

A. No, I am not sure.

Q. Do you recall whether or not Ray got sick before any shot? A. No, I didn't hear it.

Q. Do you recall incident of Billy and Don leaving the car?

A. No. I was feeling kind of sleepy and don't remember much. I heard talking, that's all.

Q. Were you in uniform? A. Yes.

Q. Do you recall before you were hit whether or not anybody drove up and stopped and looked around your car and left again?

A. I don't know.

Q. Do you recall the whereabouts in the car before you woke up? A. I was in the front seat.

Q. Can you sit here right now and recall that you were sitting in the front seat or when you came to you were in the front seat?

A. I was in the front seat.

Q. Can you think back and remember sitting there?

A. Yes. All I remember is when I was when he was hitting me, I was behind the wheel.

Q. Did you drive the car at all?

A. No. I was just sitting there.

Q. (D.A.): He wasn't so sure he heard the shot. Last time you gave the impression you weren't sure when shot was fired. How did you remember?

A. I think I heard some kind of a hard noise. I know I heard that.

Q. (D.A.): Could it have been the car stopping or could it have been the slam of a door?

A. Yes.

Q. (D.A.): After he hit you could it have been? Not certain of noise before or after you were hit?

A. I heard what sounded like a shot or a loud noise before I got hit.

Q. (CLC.): Last time Henry talked to you you weren't sure whether noise before or after you got hit?

A. The only time I heard noise was before I got hit.

Interview With Donald Apa, U. S. Coast Guard

12/1/54.

Q. How old are you? A. 21.

Q. How old were you at the time of the shooting? A. 21.

Q. Where are you from? A. Honolulu.

Q. How long have you been here?

A. Six months.

Q. How long in the service?

A. 21 months.

Q. Directing your attention to the gathering at Ward's Lake turnaround when, as I understand it,

you and your group were there and Madsen and his group came and left—do you remember anything about the whiskey bottle?

A. I know we had a few drinks from it and it disappeared when they came. We opened it just before they got there or while they were there.

Q. Do you recall any incident involving one of your group and Madsen?

A. When that happened I was on the opposite side of the car and I thought they were arguing. I found out one of the boys hit him, but I didn't see it. We went over and apologized.

Q. Were you in uniform that night?

A. No, I was out of uniform.

Q. After Madsen left and you fellows got in your car and left also, where were you going?

A. At that time we didn't know it was Ivans, but headed up there to try to get another bottle.

Q. Do you recall driving down the old road from Ward's Lake? A. Yes.

Q. What was Madsen doing?

A. As we came out, somebody said they saw him there and by the time we got close they started to back out.

Q. Do you recall whether your car made any contact with theirs? A. No.

Q. After you and Carl and Raymond and Billy remained in the car and Vera and Mike and Dick left, what took place?

A. In the car nothing happened. We started to talk because Raymond was not feeling good and Billy and I were up. I was in the back seat on the

right-hand side and Raymond was either lying down—I am not sure what he was doing. I think he was lying down.

Q. When you left the car what was he doing?

A. He was heaving outside the car on the left-hand side.

Q. Did you attempt to take him with you?

A. Yes. He said he didn't want to go, so Billy and I left.

Q. Could he have gotten up and walked out?

A. That I don't know.

Q. As you recall, he was awake and in the process of getting sick when you left the car?

A. He was just heaving when I left.

Q. Did you leave ahead of Billy?

A. I think we walked up together. I am not so sure.

Q. Do you recall whether you had to wait outside of the car or whether he was already out when you got there?

A. I don't remember.

Q. Do you remember when Madsen drove up the first time?

A. He just drove up and I didn't see anybody get out of the car. Billy said the boy had a gun.

Q. Did you look?

A. No, I didn't see anything. I didn't look. I didn't move and just laid down on the floorboard on the back seat.

Q. What was Raymond doing?

A. I think he was sitting down at that time. I went down but he didn't go down with me.

Q. How did you know when it was time to get up? A. We heard the car leave.

Q. Did you try to get Carl to leave?

A. Billy tried but he didn't want to go.

Q. Did Carl say why he didn't want to go?

A. I don't remember.

Q. Was he talking?

A. I think so. I am not sure.

Q. Do you recall whether he was asleep or unconscious when you left? A. I don't know.

Q. Did you have any conversation in the car with Carl from the time Vera and them left and the time Madsen came up?

A. I think I recall talking with him at the same time Billy and I talked. Raymond was not in the conversation too much.

Q. When you left the car after Madsen came and had gone on, why were you going up to the house?

A. You mean the first time?

Q. (CLC.): Yes. A. To call a cab.

Q. Did you go back to the car at all before Madsen returned? A. No.

Q. You got back after he had been and gone?

A. Yes.

Q. (D.A.): We want you to tell as much as we know about this to Mr. Cloudy. Did you come back down the driveway from the house? Did you see a car coming down the road?

A. We saw the lights of a car.

Q. (D.A.): What happened there?

A. Billy said it was them and we went into the bushes and hid there.

Q. CLC.): How far from the road?

A. From where the car was and the house, it was about half way.

Q. Could you see your car from there?

A. Not that I remember. The last thing I saw was the lights of the car. I heard one shot.

Q. Did you hear the car stop? Or a squeal of brakes or rubber. Hear any doors slam?

A. I don't remember.

Q. After you heard the shot, what did you do?

A. Waited until they left and then came out.

Q. What kind of shape was Carl in as far as drinking?

A. I think he had a few drinks and was not feeling too good.

Q. Well, would you say he was drunk? In any shape to drive? Would you have trusted him behind the wheel of a car or rather drive yourself?

A. I don't know about that. I know Carl wanted to drive so I said OK. I knew the car wouldn't go.

Q. Do you think he had too much to drink as far as driving the car to town? A. Yes.

Q. How long did you know Raymond?

A. Almost all my life.

Q. What kind of a kid was he?

A. He was a clean cut kid before he came up here. He had a few drinks at home and when I met him up here I noticed he drank a lot more.

Q. What was he like when drinking?

A. He like to have a good time.

Q. Any scrapes while drinking?

A. All the time I knew him up here he never got into any trouble.

Q. Lots of partying up here?

A. I don't know. I just came up in June. He would have been here a year in August.

Q. When you left the car was Raymond pretty drunk or was he just sick, or both?

A. I think he was both.

Q. Had you been out drinking with him before?

A. Yes.

Q. Did he tend to get pretty drunk?

A. When we went out to drink, we just bought one bottle. I never had to help him up or down or anything like that.

Q. If he had wanted to drive the car out of there——

A. I would let him drive. I trusted him. He was my friend.

Q. As far as his condition at that time——

A. I wouldn't have let him drive at that time.

Q. (D.A.): Had you had much to drink? What was your condition?

A. I was feeling good but I wasn't that drunk.

Q. (CLC.): Could you see all right. Were things blurry?

A. I could see all right and I think I could walk all right.

In the U. S. District Court for the District of Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH GLEN MADSEN, a Minor,

Defendant.

MOTION TO WITHDRAW PLEA OF GUILTY UNDER RULE 32 (D), FEDERAL RULES OF CRIMINAL PROCEDURE, AND TO SET ASIDE THE JUDGMENT THEREUNDER, AND FOR RELIEF UNDER SECTION 2255, TITLE 28, U.S.C.A.

Comes Now, Kenneth Glen Madsen, the minor defendant in the above-entitled cause, through his counsel, and respectfully moves this Court for an order permitting the said minor defendant to withdraw the plea of guilty heretofore made, and to set aside the judgment thereunder pursuant to Rule 32 (D), Federal Rules of Criminal Procedure, and for such relief as may be available to this defendant under Section 2255, Title 28, USCA, upon the following grounds:

I.

The defendant has been subjected to manifest injustice and to a denial of due process of law in that the plea of guilty was made by this defendant in complete and sheer ignorance of the effect of his

act, and because of circumstances beyond the control of this minor defendant; also, the plea of guilty was induced by acts, statements, and by such concealment of facts from this Court and defendant as to constitute misconduct on the part of Government counsel. Defendant was denied the right and aid of counsel of his own choosing, which he was able to provide. Such right is endowed to all persons by the Constitution of the United States. At no time in these proceedings, from the time of the summary ejection of the counsel of his choice, Mr. Simmons, ex parte and without a hearing or just cause, up until defendant was on the way to El Reno, Oklahoma, did this defendant have the guiding hand of counsel of his own choosing at any step in the proceedings against him. Not only was this defendant denied the right to employ and retain counsel of his own choosing to appear for him, and to guide him in the proceedings, but this defendant was also denied the right to consult with counsel of his own choosing. The court-appointed lawyers were ordered not to consult with defendant's own counsel, under pain of contempt, all of which is in violation of the law and in conflict with the Federal judicial scheme, as made and provided by the law and the Constitution of the United States and contrary to the American principle of fairness in all things.

II.

The defendant attaches to this Motion the affidavit of himself and the affidavit of his father, Floyd Madsen, in support of this Motion and makes the

same a part hereof, by reference and incorporation, as if fully set forth herein.

III.

Defendant attaches hereto, also, Exhibits "A," "B," "C," "D," "E," "F" and "G," and makes the same a part hereof as if set forth fully herein, by incorporation and reference.

IV.

The United States Attorney, Mr. Munson, stated in Exhibit "A," "the record will show that Kenneth Glen Madsen was represented by two attorneys who had been connected with the case since its inception." This statement the defendant asserts is untrue; otherwise, why should this Court have appointed counsel under the guise of forma pauperis for this minor defendant upon the ejection, without just cause, of Mr. Simmons? There was no reason, if this statement were true, for counsel to be appointed, or of the legal fiction of counsel being appointed under forma pauperis being indulged in. Defendant refers to Exhibit "B," which is a letter from Mr. Cloudy of the firm of Ziegler, Ziegler & Cloudy to Mr. Kenneth Davis, dated December 17, 1954, which clearly demonstrates that their appointment as counsel for the defendant at this stage of the proceeding, the day of the Trial, was not accompained by any intelligent or competent waiver of chosen counsel by this defendant, who at the time of the commission of this alleged crime was

but 16 years of age, not educated or acquainted in the least degree with court proceedings and legal consequences.

V.

This Court was unfortunately misadvised and misled by the United States Attorney as to the activities of Mr. Simmons, the counsel of defendant's own choosing, who had spent approximately three months in the preparation of defendant's defense. Defendant denies today, and denied then, that he is guilty of murder in any degree or of manslaughter, and asserts now and would have asserted then, if he had had counsel of his own choosing and the right to consult with counsel of his own choosing, that he has a defense which would in all probability have resulted in his acquittal. Newly discovered evidence discloses that the United States had no witness to dispute the defense of this defendant. The Coast Guardsman, Carl Tokunage, asserted in an interview with the United States Attorney and Mr. Cloudy that he was not certain whether it was a shot he heard or the noise made by an automobile while he was being struck by this defendant in their fight. At the best, the Government's only witness who was in the car with the deceased, to wit, Carl Tokunage, could not have testified beyond a reasonable doubt that this unfortunate affair was anything but an accident; this interview is attached hereto and made a part hereof as Exhibit "C." Mr. Simmons, defendant's counsel, who had prepared his case and was prepared to bring out a competent defense in behalf of the de-

fendant, was, as aforesaid, summarily and wrongfully ejected from this case on the morning of the trial. This happened, defendant asserts, because this Court was misadvised and misled by the United States Attorney. The record shows that on the 26th day of November, 1954, that Mr. Camerot, assistant to the United States Attorney, advised this Court when Mr. Simmons was not present that he had given the City Police permission for Mr. Simmons to inspect the automobile involved on Thanksgiving Day, the day before the trial was to start, when Mr. Simmons called at the Police Station to see the car; the City Police, on the other hand, had deliberately concealed this information and permission from Mr. Simmons and told him that he could not see the automobile under orders from the United States Attorney; this was an impertinent and insolent denial of due process, and Mr. Simmons, being zealous in this defendant's behalf, in his considered judgment, facing a murder trial starting within 15 hours from the time of this incident, went upon the City property to examine the car anyway. This obviously was not a trespass since Mr. Camerot, the Assistant United States Attorney, admitted to this Court that he had given Mr. Simmons permission to see the car, but the Police Department deliberately concealed this information from Mr. Simmons and from this Court; however, regardless of the right or wrong of the incident, the defendant, of the age of 16 years and with but an eighth grade education and without knowledge of the law and court proceedings, was caught within the vortex of this col-

lateral incident and was made the real victim thereof. The defendant, because of his age, education and, using a phrase from the U. S. Attorney's letter to Mr. Davis, his "dismal background," was incapable of determining for himself, without the guiding hand of counsel in these proceedings, what was good or bad for him to do. The defendant was unfamiliar with the rules of evidence and court proceedings, and being abruptly left without the aid of counsel on the morning of his trial for first degree murder, the defendant lacked the skill and knowledge to adequately decide for himself what his best interest would be under the circumstances. When this Court requested and insisted that this defendant accept and take the oath of a pauper, and thereby create a legal fiction whereby counsel not of defendant's own choosing could be appointed for him in spite of his father's assertion in open court at the time that if given time he would employ other counsel of his own choosing, the Court thereby coerced and intimidated this minor defendant and denied him due process of law.

VI.

The record, supported by the affidavits of this defendant and of his father, attached hereto and made a part hereof, and the assertions and letters of Ziegler, Ziegler & Cloudy, the court-appointed counsel, clearly demonstrates their own admitted incapacity and inadequacy to handle this defendant's case; as they stated, they never had defended

a case of first degree murder and felt unequal to the task. Furthermore, this Court did not allow them time, one week only, to prepare a defense for defendant. Under all the circumstances, and considering that defendant was confined to jail and charged with a capital offense and the appointed attorneys were young and inexperienced, the time allowed to them to prepare the defense was too short. Especially when the Court forbade them to consult with Mr. Simmons.

VII.

This unfortunate accident, for which this defendant was charged with murder, occurred on August 6, 1954; this defendant was at that time 16 years of age; this defendant's mother died a few days later as a result of the shock incident thereto; the defendant's mind was in a state of quandary, confusion and bewilderment. At the present time this defendant is but 17 years of age, and attached hereto is a photograph taken of this defendant in Seattle in the King County Jail on December 28, 1954, while in custody of the United States Marshal, and made a part of this Motion as Exhibit "F."

VIII.

The court-appointed counsel were incapable of handling the defense of this case, according to their statements to this defendant, to this defendant's father, and to others. This defendant has been the victim of circumstances beyond his own control and a manifest injustice has occurred in violation of the

law. Defendant's plea of guilty, improvidently made without intelligent and competent advice by counsel of defendant's own choosing, should be set aside pursuant to Rule 32 (D) of the Federal Rules of Criminal Procedure.

IX.

According to evidence now made available for the first time to this defendant by Mr. Cloudy in his letter to Mr. Davis of December 17, 1954, this was the first time that defendant knew that the District Attorney had no witnesses to dispute the evidence of this defendant except the witness, Carl Tokunage, who had stated that he did not know the difference between a shot and the noise of an automobile; this was a concealment of a material fact, in violation of the United States Attorney's oath of office; the defendant asserts that he had no intent to kill anybody in this unfortunate accident, for this defendant never knew that the deceased was in the back seat of the automobile at the time; the United States Attorney had no one to testify that this defendant knew that the unfortunate boy who was accidentally killed was in the back seat of the automobile and no intent to kill could be proven or inferred. This defendant has been deprived of the use of this evidence and his other rights, as shown by the letter of Mr. Cloudy, as aforesaid. Mr. Cloudy did not file a motion and brief to attack the indictment, as set forth in Exhibit "B," simply because "they might have indicted this defendant over again."

X.

There is no evidence showing this defendant could have been convicted of murder in any degree or even manslaughter; in fact, the evidence not heretofore available to this defendant, because of the inadequacy of counsel, shows conclusively that this defendant would not have been convicted at all had he been given his legal rights to have adequate counsel and intelligent guidance at all steps in the proceedings against this defendant. The court-appointed counsel's admission of his inadequacy, in that he thought the indictment was faulty but failed to attack it, should not be imputed to this defendant because of defendant's ignorance, defendant's age, and the defendant's incapacity for determining for himself whether the indictment was good or bad.

XI.

This defendant is now in custody under a sentence of this Court which was imposed in violation of the Constitutional rights of this defendant and in violation of the laws of the United States; and this Court was without jurisdiction to impose such a sentence because of noncompliance with Sec. 51-3-3 and 51-3-9 of Alaska Compiled Laws Annotated which read as follows:

> "Sec. 51-3-3. Jurisdiction. Jurisdiction in cases of children under 18 years of age shall be vested in the Justice Court, which shall have exclusive original jurisdiction in proceedings concerning any child residing in this Territory who (1) has violated any law of the United States or the

Territory or any ordinance or regulation of a subdivision of the Territory; (2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; (3) is habitually truant from school or home, or habitually so deports himself as to injure or endanger the morals or health of himself or others; (4) is abandoned by his parent, guardian or custodian; (5) lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian; (6) associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others; (7) is mentally deficient or in need of special care or training provided his parent or guardian consents in writing that such child comes within the provisions of this Act.

"The Justice Court shall also have exclusive jurisdiction in any controversy arising over the custody of a child, and to appoint a guardian of the person and property of any child within its jurisdiction.

"Provided, that such jurisdiction provision shall not be applicable in divorce or separate maintenance cases arising in the District Court, but in such cases the District Judge may, if he deems it best for the welfare of a child involved, order the child turned over to the custody of the Welfare Department. In such event the Wel-

fare Department shall receive such support money as is ordered to be paid by the court and use same to carry out suitable arrangements for the child."

"Sec. 51-3-9. Waiver of jurisdiction. If a child is charged with an offense which, if committed by an adult, would constitute a felony, the court after full investigation may waive the jurisdiction vested in it by this Act, and order such child held to await action by the grand jury; otherwise, the court shall proceed as herein provided."

and such sentence should now be vacated and set aside as a manifest injustice and relief allowed defendant under Rule 32 (D) Federal Rules of Criminal Procedure, and under Section 2255, Title 28, USCA.

Wherefore, this defendant respectfully requests this Court to set a date for hearing on this Motion, on a day certain, with the right given to this defendant to call witnesses to give oral testimony in his behalf in support of this Motion; and, defendant respectfully prays this Court to set aside, as aforesaid, and to vacate and to hold for naught the sentence and judgment imposed upon the plea of guilty heretofore made and to allow a withdrawal of such plea of guilty, and grant such other relief as the Court may deem just in the premises.

/s/ KENNETH DAVIS,
Attorney for Defendant.

In the U. S. District Court for the District of Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH GLEN MADSEN, a Minor,

Defendant.

MOTION FOR SPECIAL SETTING OF HEARING ON MOTION TO SET ASIDE PLEA OF GUILTY UNDER RULE 32 (D), FEDERAL RULES OF CRIMINAL PROCEDURE

Comes Now the defendant, through his counsel, and respectfully requests this Court to set an immediate date, upon ten days' notice to all counsel, for the hearing on the motion to set aside the plea of guilty under Rule 32 (D), Federal Rules of Criminal Procedure, which Motion was airmailed to this Court and to all counsel on the 11th day of January, 1955, postage prepaid. This defendant, in addition, moves this Court for an order setting this hearing in either Juneau, Anchorage or Ketchikan, whichever place is to the greatest convenience of the Court, in order that the long-established policy of giving criminal cases precedence over other matters may be adhered to, for defendant is now in Seattle,

Washington, in the King County Jail, in custody of the United States Marshal, and his rights should be determined at once.

KENNETH DAVIS,
Attorney for Defendant.

(Copy)

In the U. S. District Court for the District of Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KENNETH GLEN MADSEN,
Defendant.

AFFIDAVIT OF KENNETH GLEN MADSEN IN SUPPORT OF A MOTION TO WITHDRAW A PLEA OF GUILTY AND TO SET ASIDE THE JUDGMENT UNDER RULE 32 (D), FEDERAL RULES CRIMINAL PROCEDURE; AND FOR RELIEF UNDER SECTION 2255, TITLE 28, USCA

State of Washington,
County of King—ss.

Kenneth Glen Madsen, being first duly sworn, on his oath states as follows:

I am the defendant above named and was 16 years of age at the time I was charged with murder in

the first degree in the above-entitled cause, and I have only had an eighth grade education.

This charge arose out of an unfortunate accident, for which I am terribly sorry, which occurred August 6, 1954. I was a resident of Ketchikan, Territory of Alaska, and lived with my mother, my father, and my 13-year-old brother before the occurrence of the accident which resulted in my being charged with murder. My mother was not well at the time and the shock of my being charged with murder was too much for mother. She died while I was in the jail. She had come to see me at the City Jail but the police refused to let either her or my father see me before I was charged with murder. This refusal was at the instructions, I believe, of the United States Attorney. She dropped dead at home a few days later from the shock. The impact of this unfortunate accident and my mother's death upon my mind left me in a quandary and in a state of confusion from which I wonder if I will ever recover. I had never been in any trouble before except in minor traffic violations. While I was in the Ketchikan City Jail and my folks did not come to see me, I worried a great deal because we have always been a very close family. I know that the Police Department kept my family from seeing me because they told me so. After my mother's death, I did get to see my father on visiting days for a few minutes but always in the presence of the jailor, and I could not confer or talk freely with my father in any degree whatsoever. I became so depressed during this

period that my father became concerned for fear I might lose my mental faculties. The attorney he went to see in Ketchikan did not want my case. He had never defended a person charged with murder and felt that because of the seriousness of the charge and because I was only 16 years old my father should get an experienced trial lawyer from outside the Territory to defend me. This he did. On September 3rd, 1954, Mr. J. Lael Simmons of Seattle, Washington, who had been employed by my father, came to see me. Mr. Simmons talked to me at length and encouraged me to believe that I would have a fair and impartial trial and would not be "railroaded" as some of my fellow prisoners had told me. The first thing Mr. Simmons tried to do was to get me out on bail. My bail had been fixed at $20,000. This effort to be released on bail was defeated because the Commissioner, Mr. Lien, revoked the bail at the request of the District Attorney. The Commissioner is a Norwegian contractor with no legal education or experience and despite all efforts made by Mr. Simmons in my behalf, including a trip to Juneau to see the District Attorney, there was no reinstatement of bail. This turn of events led me to believe that perhaps I might be railroaded and hanged for a purported crime that was in fact an accident. I was aware of the fact that Mrs. Wells, who was charged in Anchorage with killing her husband, had been released on $10,000 bail and of course I wondered why my bail was twice as much when fixed and why it was later revoked entirely. However, I had lots of confidence in Mr. Simmons

and felt that he could get me a fair trial and that once I could tell the jury and the people of Ketchikan how the fatal shooting took place I would be freed. So I lived in hope of getting a chance to explain what had happened in open court before the jury and my friends.

My hopes of a fair hearing or trial were shattered when I was advised by Mr. Simmons that he had been excluded from the case. I had no chance to discuss with him any plans for the future conduct of my case but was summarily brought before the Judge and ordered to sign a "pauper's affidavit." I didn't know what I was signing. I had no chance to read it. I was afraid of the Judge. Everybody stared at me. I felt uneasy and beat. I suppose I would have done anything I was told to do at that time. I realize now that it was a great mistake. If only I could have talked to Mr. Simmons for a minute I would never have signed the paper.

The lawyers appointed by the Judge had almost begged the Judge not to become involved in the case without Mr. Simmons to help them, but the Judge rode roughshod over everybody including the lawyers. They all seemed to be afraid of him. My father asked the Judge for time to engage other counsel of our own choice, but the Judge brushed him aside as if he were so much trash.

Soon after the Court-appointed lawyers took over they began to prepare my defense, but I understood they were to get no pay for their work and naturally

I didn't expect much of a defense. It became apparent to me that I was being "railroaded" when one of these Court-appointed lawyers kept telling me what damaging evidence the Government had and what a weak defense I had. He also told me that the District Attorney had changed his mind and was going to ask for the death penalty in my case. I became so upset and worried as a result of the turn of events in my case that I ceased to care, gave up and was completely distracted. Consequently on being pressed to plead guilty on a promise of leniency and at least a pre-sentence hearing, I consented. This plea was coerced. I did not make it of my own accord. I knew at the time and I know now that such a plea was untrue and therefore wrong. I was surrounded by my enemies at the time. If I could have spoken freely to a single friend or lawyer who had my interests and welfare at heart, I certainly would never have consented to that plea.

I am making this affidavit in the King County Jail at Seattle, Washington. I make this affidavit in order to attempt to correct a manifest injustice which was imposed upon me because of my ignorance and because I did not have the intelligence to realize my rights under the Constitution of the United States. I entered that plea of guilty under a mistaken belief which was induced both by the acts and statements of the Government counsel and the acts and statements of the Court-appointed lawyers who had admitted in open Court that they

had never had any experience in trying a case of my kind. My father had told the Court that he was not broke and would employ other counsel, but the Court abruptly ruled him aside and forced and coerced me to take a pauper's oath when we were not paupers. Under that fiction, the Court appointed lawyers who were not familiar with my case and thereby denied me due process of law. They were unfamiliar with the case, they along with the Government counsel induced and coerced me into making a plea of guilty under the mistaken belief that I would get justice when, in truth and fact, I was being "railroaded" to the penitentiary without a trial and without any intelligent waiver of my rights. I was in a sad state of confusion over the death of my mother, this unfortunate accident, and the abrupt dismissal of Mr. Simmons on the day my case was set for trial. I am not guilty of murder. This was not murder; it was an unfortunate accident. I did not intend to kill anybody. True, I did a wrong thing in drinking and carrying a gun but so did everybody else who was at that party on the highway that night including the unfortunate boy who was killed accidentally. Nobody had the intent to kill anyone. I verily believed these Japanese boys had knives and I took my gun as a protection against possible assault. I make this affidavit also because of the misconduct of the District Attorney who handled my case and who sat in conference with my Court-appointed attorney. This District Attorney kept saying he could ask that I be hung by the neck until I was dead—and he used that phrase,

I quote it, "hung by the neck until I was dead"—it made me so panicky, what with my confusion over the death of my mother and over the death of this unfortunate boy because of this accident and the dismissal of my counsel, I didn't know what to do. I could not at any time confer with my counsel, who had made several trips to Alaska and had investigated the case, or with my father. They forced and coerced me into making this plea of guilty. I am advised also that the Court met my Court-appointed attorney upon the street on the day trial commenced and told him, this counsel of mine who was Court-appointed and not experienced, that he had better make a deal with the District Attorney.

I am also advised that I did not receive my rights as a minor under the Juvenile laws of Alaska where a minor is to be held until after an investigation is made by a justice of the peace and he after such investigation, while he may waive me over to the Federal grand jury, yet he has to make an investigation. He never made any such investigation in my case, nor did he sign any waiver, and if he had made such an investigation, he would have found that the situation of our family was such, what with the death of my mother, the prostration of my father over this unfortunate accident, and the confusion I was in, he very well could have refused to turn me over to the grand jury for indictment. Further I might have had a right to appeal from

any order of waiver. My father and these lawyers who the Court appointed were forbidden by the Judge and afraid to talk to Mr. Simmons after he had been unnecessarily and unfortunately ejected from the case. The Court made no provisions for giving Mr. Simmons a hearing, but threw him out summarily. The Court ordered me not to talk to Mr. Simmons and my father was ordered not to talk to Mr. Simmons, and my Court-appointed lawyers, who admitted they had never tried any such case as mine, told me that I could not use, nor could they use, any of the work that Mr. Simmons had prepared in aid of the defense of my case.

There was never any intent to kill anybody in this unfortunate accident because, in the first place, the accident happened in the course of a fight. I had a gun which was discharged accidentally and killed the Japanese boy in the back seat of the car. I didn't know he was in the car. Obviously—and I repeat this—obviously I could not have had any intent to kill him because I never knew this unfortunate boy was in the car at the time. How could I have an intent to kill him if I didn't know he was there? I only thought that there was one person in the car and that was a person who was striking at me and whom I was defending myself against with the butt end of a pistol. The car was tipped over in such a way on the road in the barrow pit that it was impossible for anyone to see that another person was in that automobile—it was dark (about 2:00 a.m.)—so, therefore, after I have collected my thoughts, it occurs to me that I could not have the

intent to kill anyone in second degree murder or first degree murder. I didn't know such a person was present. I could not, I understand, even be convicted of manslaughter under the facts. I didn't know a person was there. It might have been negligence on my part if I had known he was there, but I didn't know he was there. I have, I submit, been denied my rights in a court of law under the due process clause of our Constitution.

KENNETH GLEN MADSEN.

Subscribed and Sworn to before me this 23rd day of December, 1954.

[Seal] K. G. SMILES,
Notary Public in and for the State of Washington,
Residing at Seattle.

(Copy)

In the U. S. District Court for the District of Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH GLEN MADSEN, a Minor,

Defendant.

AFFIDAVIT OF FLOYD MADSEN, FATHER OF KENNETH GLEN MADSEN, IN SUPPORT OF A MOTION TO WITHDRAW A PLEA OF GUILTY AND TO SET ASIDE THE JUDGMENT UNDER RULE 32 (D), FEDERAL RULES OF CRIMINAL PROCEDURE; AND FOR RELIEF UNDER SECTION 2255, TITLE 28, USCA

State of Washington,
County of King—ss.

Floyd Madsen, being first duly sworn on oath, deposes and says: That he is the father of Kenneth Glen Madsen, the minor defendant in the above-entitled cause; beginning with the day of the trial when the trial of my son for murder in the first degree was supposed to begin, I arrived at the Courthouse a little behind schedule and while the Court was taking care of some other matters, a man

in the hallway told me that Mr. J. Lael Simmons, my minor son's attorney, had been ejected from the case and could not defend our case. This was the first indication of any kind that I had had that we had no counsel. I stayed in the hallway outside the Courthouse while Mr. Simmons attempted to be reinstated in my son's case and did everything in his power to get back in the fight and continue as our counsel. When things had settled down and Court was convened, Kenneth, my minor son and defendant, and I were called before the Judge and the Judge asked me if I had counsel and I told him I had engaged Mr. Simmons; the Court informed me that Mr. Simmons could no longer represent my son; I told the Court that I would get another attorney if given a little time; this the Court refused; then I asked permission to speak to Ziegler & Cloudy. The Court had already indicated that Kenneth would have to sign a pauper's oath. I conferred with Mr. Cloudy for a few minutes in the anteroom near the Judge's chambers and was advised that I should go ahead and permit Kenneth to sign a pauper's oath, but to try to get as much time as possible. We returned to the courtroom and acting upon Mr. Cloudy's advice, I made the statement to the Court that I was not broke and that while I was badly stretched, yet I could still raise money to have counsel of my own choosing for my son's defense, and that it was not necessary to take the pauper's oath, but that I couldn't raise the money until the banks opened Monday morning—this was on a Friday morning. The Judge informed

us that the Court didn't have any time to waste on things like that and that the Court would appoint counsel for Kenneth, whereupon the Clerk prepared a pauper's oath and the Court ordered Kenneth to sign that he was without funds and couldn't borrow money, and so forth, and he did sign the pauper's oath. Of course a sixteen- or seventeen-year-old boy had no funds, but I was not broke and if given two days' time, I could have raised money to employ counsel.

The Court was then recessed to convene again on December 6, 1954, at 9:30 in the morning, a delay of only nine days for new counsel to defend my son on a first degree murder charge, upon which Mr. Simmons had been working since August 20, 1954, or three months. The court-appointed counsel were, by the Court, forbidden to use any of Mr. Simmons' work.

I appeared in Court on time on Monday morning, December 6, 1954, and they began the impanelling of the jury. Each side had used ten challenges and the jury, you would say, was half picked when the noon recess came and the jury panel was exhausted. I went home for lunch and when I came back I was met in the hall by Mr. Ziegler who asked me to come on down to the District Attorney's office. I went into the District Attorney's office and while there, Mr. Ziegler and Mr. Cloudy, the court-appointed counsel, were on one side of the room along with the three District Attorneys and they were discussing Mr. Simmons and his ability to handle the case.

Mr. Ziegler made the statement to the District Attorney that Mr. Simmons should never have given us any hope to get the boy freed because there absolutely was not enough evidence to warrant an acquittal and that he would probably get the maximum sentence. Mr. Ziegler and the District Attorney discussed several other cases to be held in the future at Juneau; they discussed the merits, pro and con, of one case and another, civil actions, that is, and whether or not he thought he could win them on certain phases of the law they discussed and I just overheard. About this time Mr. Cloudy disappeared out one door and immediately after Mr. Ziegler and the three District Attorneys instructed us to stay in the room; by us, I mean, Kenneth and I; they put us in one room and they disappeared into the other room for some purpose —I imagine a conference. They placed Kenneth in a chair facing the bloody seat from the car in which the shooting took place. Upon their return they took us into another office wherein they harrangued us some more, both Mr. Ziegler and the three District Attorneys, all telling us what could be done and what couldn't be done, and then when the Marshal showed up—that I guess is what they were waiting for—we were taken to the jury room where we were permitted to talk to Ziegler and Cloudy, with the Marshal outside. Ziegler started the talk and then Mr. Cloudy, then Ziegler left and Cloudy took over. During the course of this conversation in the jury room, Mr. Ziegler told me that he had

talked to Judge Folta during the noon hour on their way down to lunch and that Judge Folta had told him that whatever verdict the jury brought back that the Judge was going to give Kenneth the maximum penalty under the law. In this instance he pointed out that while the District Attorney had said he was not going to ask for the death penalty, it would not be impossible to impose such in case the jury did bring back a verdict of guilty of first degree murder. He also pointed out that if the jury brought back a verdict of second degree murder, that the sentence could be more than 25 years. He also pointed out the fact that they had been promised a pre-sentence hearing, at which time I would be allowed to testify and to have all of Kenneth's friends that we wanted as character witnesses; people that had known him a long time and he pointed out the benefits of a hearing of this kind. This hearing was also agreed to by the District Attorney earlier. Mr. Ziegler also informed me that regardless of what I wanted, what I said, whether I gave my permission or not, that Kenneth could do as he pleased, even though he had just then turned seventeen.

Another thing that I didn't learn until afterwards, after the plea of guilty had been made, was the fact that my court-appointed attorneys had informed Kenneth in the cell prior to the sentence that if the case were appealed, if the decision went against us and the decision was appealed, that the Court of Appeals could impose the death penalty.

Going back to December 6th when the two attorneys—that is, Ziegler and Cloudy—myself and Kenneth were before the Court, it was brought out that one of our star witnesses as to Kenneth's character lived in Seattle. It was made as a direct question to the Judge if he would hear this man if he should be a little late. We asked the Judge if Pete Sanstol, Civic Center Director of Ketchikan for eight years, would be allowed to be heard if he were a little bit late, and the Judge did agree on that day to hold Court open and withhold sentence until Pete could be heard in case he got to Ketchikan too late to be heard at the morning session. Then the next day, when Court was called into session, no one was allowed to testify as to the character of Kenneth. The attorneys for Kenneth were shut up at every chance; they had a chance to say very little. Mr. Cloudy did try to make a good talk before the Court but every time that he brought out anything that was advantageous to us, to Kenneth's case, he was cut off, either by the District Attorney or the Judge. The Judge was not interested in any way—and he so stated—in Kenneth's character, in his abilities or his truthworthiness. At one time during the pre-sentence hearing so called, the Judge made the statement that he did not care what kind of a boy Kenneth was when he was sober; what he wanted to know was what kind of a boy was he when he was drunk. Mr. Cloudy said that we also had witnesses that could testify to that. The Judge then stated that he didn't care about that either.

I would like to state that this plea of guilty was made against my better judgment and over my protest all the way through. The fact that Mr. Ziegler had told me that whatever I said, however I felt about it, didn't matter, and that Kenneth could do as he pleased, led me to think that perhaps Kenneth would go ahead and plead guilty no matter what I said; I kept telling him that it was wrong. Another thing that led Kenneth to plead guilty was the fact that we had been to such an expense that he figured that he would take his medicine for his mistake and leave me free to pursue my life and not spend any more money on the case. I did not know this at the time. Remember, this boy's mother had died and the boy did not want to burden me further, although it was no burden but a cause for one that I love. If one would look at Kenneth's picture attached hereto and made a part hereof, you can see how youthful and immature he is even now. I'd like to repeat that Kenneth is not a vicious boy, he is not a mean boy, he has worked with me on a fishing boat since he was thirteen years old. He is a gentleman when with older people and has a very good reputation among his friends and the people who know him. He was coerced into pleading guilty by a systematic scheme engineered by the Judge in co-operation with the District Attorney and accepted by our court-appointed lawyers.

I only regret that I was unable to defend myself and Kenneth against the unwarranted attack made

upon us by Mr. Camerot who had no basis whatever in fact for the statements he made in court against us.

FLOYD H. MADSEN.

Subscribed and Sworn to before me this 28th day of December, 1954.

[Seal] J. LAEL SIMMONS,
Notary Public in and for the State of Washington,
Residing at Seattle.

United States District Court, First Division, Territory of Alaska, Judge's Chambers, Juneau

George W. Folta, Judge.

December 22, 1954.

Senator William Langer,
Senate Office Building,
Washington, D. C.

Dear Senator Langer:

Your radiogram of the 17th recommending Mr. Kenneth Davis for admission to this Bar for the purpose of participating in a proceeding which he intends to bring was received several days ago, and will make it unnecessary for me to have some local person vouch for him.

With best wishes for the holidays, I am,

Sincerely yours,

/s/ GEORGE W. FOLTA,
District Judge.

(Copy)

December 28, 1954.

United States District Court,
Office of the Clerk,
Territory of Alaska,
First Division,
Ketchikan, Alaska.

Attention: J. W. Leivers, Clerk.

In re: U. S. vs. Kenneth Glen Madsen, a minor; Criminal Action File No. 1652-KB

Dear Mr. Leivers:

1. Will you kindly send me by return mail a copy of any form or forms for seeking admission to the U. S. District Court for Alaska for the purpose of arguing a motion to set aside the plea of guilty in the above-entitled cause under Rule 32 (D), Federal Rules of Criminal Procedure, and for relief of the above minor under Section 2255 USCA.

2. I was told about a rule promulgated by Judge Folta on December 20th, 1954, relating to outside counsel. I always comply with any rule of any court I appear in. Therefore, I respectfully request that you send me by return mail a copy of the rules of the United States District Court for Division No. 1.

3. I am awaiting the receipt of an entire transcript of record which I ordered from the court reporter before the filing of the respective motions

setting forth very definitely and with particularity the denial of due process to this minor.

4. I surmise these petitions will be filed within the first or second week of January, depending upon the speed of the court reporter. Would you, therefore, give me an idea of the court schedule and as to whether these petitions would likely to be heard in Juneau or Kechikan? I would prefer them to be heard in Ketchikan for as I have stated heretofore, I believe it obligatory on the Department of Justice to permit this minor to be a witness in person, together with his father, Floyd Madsen.

5. What is the motion day when the court is setting at Ketchikan?

In conclusion, I would appreciate your immediate attention to the above items and the filing of this letter in the record of the above-entitled cause.

Very truly yours,

KENNETH DAVIS.

KD:ha
Airmail

P. O. Address:
812 Joshua Green Building,
Seattle 1, Washington.

cc: The Hon. Theodore Munson,
United States Attorney,
Juneau, Alaska;

The Hon. George W. Folta,
U. S. District Court,
Juneau, Alaska;

The Hon. Herbert Brownell,
Attorney General of the United States,
Justice Department,
Washington, D. C.;

Clerk of the U. S. District Court,
Juneau, Alaska.

United States Senate
Committee on the Judiciary

December 29, 1954.

Hon. Kenneth Davis, Attorney,
812 Joshua Green Building,
Seattle 1, Washington.

Dear Mr. Davis:

Inasmuch as Senator Langer is presently in North Dakota, we are taking the liberty of sending you the letter he received from Judge George W. Folta, which you may wish to have.

With kind regards and best wishes, I am,

Sincerely,

/s/ IRENE MARTIN EDWARDS,
Assistant to Senator Langer.

IME:dfg

Exhibit A

United States Department of Justice

United States Attorney
First Division, District of Alaska
Juneau

December 31, 1954.

Mr. Kenneth Davis, Attorney,
812 Joshua Green Bldg.,
Seattle 1, Wash.

Dear Sir:

This acknowledges your letter of December 22 and the attached letter addressed to the Hon. George W. Folta.

In your letter you asked whether we would "entertain the idea of consenting to the motion to set aside the plea of guilty" and putting Kenneth Madsen "to trial on the merits." In support of this you state rather categorically that Kenneth Madsen was deprived of due process. I am firmly convinced, however, that he was afforded not only his right to due process but was extended considerable leniency by the District Court when he was permitted to plead to the lesser included offense of Second Degree Murder and also when the Court gave him a sentence of twenty-five years imprisonment instead of life imprisonment. The record will show that Kenneth Madsen was represented by two attorneys who had been connected with the case since its inception.

[In margin: Note—Why appoint counsel forma pauperis then?]

Since you have not yet received a transcript of the record of the case and since it does not appear that you are familiar with the facts of the case I wish to inform you that Madsen killed a twenty-year-old coast guardsman by shooting him in the back of the head while he was asleep. The Grand Jury returned an indictment charging Madsen with Murder in the First Degree. Because of the age of this defendant we recommended to the Court that his offer of a plea to Second Degree Murder be accepted. In sentencing the defendant the Court took into consideration the rather dismal family background of the defendant and his age, and gave him what is undoubtedly a humane sentence.

In view of the foregoing, the answer to your question is "No." We would not entertain the idea of consenting to your motion to set aside the plea of guilty of Murder in the Second Degree.

Very truly yours,

/s/ T. E. MUNSON,
United States Attorney.

(Copy)

Exhibit G

January 4, 1955.

The Hon. Theodore Munson,
U. S. Attorney,
Juneau, Alaska.

In re: U. S. v. Kenneth Glen Madsen, a minor; Cause No. 1652-KB

Dear Mr. Munson:

I received your letter of December 31, 1954, and have taken the privilege of setting it forth as an Exhibit in the attached Motion to vacate the plea of guilty under Rule 32 (D) of the Federal Rules of Criminal Procedure and for such relief as is possible under Section 2255, Title 28, USCA.

I would appreciate your informing me why it was necessary to appoint counsel under forma pauperis, as was done, if this minor defendant had counsel of his own choosing and selection, and the guiding hand of counsel at every step of the proceedings against him, if these lawyers, Ziegler, Ziegler & Cloudy, had been in the case since its inception?

I am attaching this letter as Exhibit "G" to the Motion to set aside the plea.

I would appreciate at least two weeks' notice of

a hearing date. I so wrote to the Judge as per the enclosed.

Very truly yours,

KENNETH DAVIS.

KD:ha

encl.

Airmail

cc: Hon. George W. Folta,
Juneau, Alaska;

Ziegler, Ziegler & Cloudy,
Ketchikan, Alaska;

Hon. Herbert Brownell,
Attorney General of the U. S.
Washington, D. C.

(Copy)

January 4, 1955.

The Honorable George W. Folta,
U. S. District Court,
Juneau, Alaska.

In re: U. S. v. Kenneth Glen Madsen, a minor. Cause No. 1652-KB

Dear Judge Folta:

I enclose herewith the original Petition and Affidavits and Exhibits, and the Motion and petition of

Kenneth Glen Madsen to vacate and set aside the plea of guilty heretofore made in this cause on the grounds and for the reasons stated in this petition.

I hereby enclose also the original certificate from the Supreme Court of the State of Washington and from the U. S. Court of Appeals Ninth Circuit certifications that I am in good standing of its courts.

I received from Senator William J. Langer a copy of your letter to him on the 22nd day of December, 1954, stating that I would be permitted to argue this cause on behalf of this defendant without the necessity of local counsel being employed and I appreciate your kindness in such respect.

I wish you would have your Clerk file these originals and notify me of a convenient date for this Court to hear this Motion and in which city, namely, either Ketchikan or Juneau.

I am sending a copy of this letter to Mr. Theodore Munson, U. S. Attorney in Juneau, Alaska, to Ziegler, Ziegler & Cloudy, attorneys in Ketchikan, and to Attorney General Herbert Brownell in Washington, D. C.

It is my considered opinion, in order to make my record to which this defendant is entitled, that I would like to have the oral testimony of Mr. J. Lael Simmons, the oral testimony of this defendant, his father, Floyd Madsen, and Mr. Ziegler and Mr. Cloudy. This matter could be disposed of, I believe, in at least one day but hardly less. I would ap-

preciate at least two weeks' notice being given me of the hearing date so that preparations could be made to come to Alaska in sufficient time in advance of the hearing.

I wrote Mr. Leivers, the Clerk of the Court, on December 28th asking him for said information but have received no answer thereto.

Very truly yours,

KENNETH DAVIS.

KD:ha
enclosures
Airmail

cc: Hon. Theodore Munson,
U. S. Attorney,
Juneau, Alaska;

Ziegler, Ziegler & Cloudy,
Attorneys at Law,
P. O. Box 1079,
Ketchikan, Alaska;

Hon. Herbert Brownell,
Attorney General of the U. S.,
Washington, D. C.

(Copy)

January 12, 1955.

Hon. George W. Folta,
U. S. District Court,
Juneau, Alaska.

In re: U. S. v. Kenneth Glen Madsen, a minor; Cause No. 1652-KB

Dear Judge Folta:

Enclosed is a Motion for a special setting which I am submitting without argument. Copies hereof are being sent to all counsel.

The defendant is in jail in Seattle, suspended midway between "heaven and earth," so to speak, and his rights should be speedily determined.

Does your letter to Senator Langer of the 22nd of December, 1954, permit me to argue this matter, upon the showing I have made, in view of your new Rule II? I was not aware of this Rule and your letter to Senator Langer was dated December 22, 1954, two days after the promulgation of Rule II.

Very truly yours,

KENNETH DAVIS.

KD:ha
encl.
Airmail

January 18, 1955

J. E. Leibere, Clerk
United States District Court
Nome, Alaska

Re: U. S. vs. Kenneth Glen Madsen, a Minor
No. 1452-Cr

Dear Mr. Leibere:

Thank you for your prompt letter of January 14th wherein you advised me that Judge Folta states I have misinterpreted his letter to the Honorable William J. Lemmer in that Judge Folta stated he meant that the local lawyer need not "identify" or "vouch" for me, but that I would still have to comply with Rule 2 promulgated December 20, 1954. As I understand, Rule 2 requires that a local attorney must (1) make an affidavit that he shares equal responsibility in all decisions in the matter with the petitioning out-of-district counsel, and (2) that a written motion must be made for my admission.

Please be advised that I always comply with all rules of court and I ask no exception in this case, and so that all parties may understand my position, I am sending copies of this letter to them.

You have on file (1) a statement by the Clerk of the Supreme Court of Washington in respect to me, (2) a certification by the United States Court of Appeals respecting my admission there, and (3) a personal statement complying with Form 2, page 27 of your local rules. Consequently, I have advised Mr. Madsen of this statement of yours of January 14th and he will no doubt secure local counsel to make my motion for admission.

In the event that local counsel cannot be obtained to assist me in this respect, then I will file an affidavit with your court setting forth the record, as made by letter, communications, and a reporter's transcript, and take the position under Sec. 2255, Title 28, U.S.Code, that "the remedy by motion is inadequate or ineffective to test the legality of his detention." This is obviously the case if the minor prisoner cannot secure counsel to appeal in court for him or if his counsel cannot get into the court.

I suggest for the benefit of counsel that a very careful reading be given to the case of Chandler vs. Fretag, 348 U.S. 3, 75 S.Ct. 1 (decided November 8, 1954).

. Lolters, Clerk
United States District Court, Juneau, Alaska
Page 2. January 18, 1935

I would appreciate if you would advise me as to the disposition of the motion I submitted, waiving argument and asking for a special setting for this cause. Contrary to the rumors I have been hearing about the feeling toward Seattle lawyers in Alaska, I beg to advise all and sundry that I have never met any lawyers or judges in Alaska who have not treated me in any way but with the utmost courtesy and respect. Also, Seattle lawyers are a first class group of men, just as, I am sure, Alaska lawyers are courteous and learned men. Additionally, this is not a contest among boilermakers with the use of brawn, but an intellectual contest over the due process denied or allowed to a minor boy. Both sides cannot be right. One side has to lose, but the loser can have access to the appellate courts as a gentleman and a lawyer should do, but in the meantime, I suggest that this matter be disposed of in the interest of economy to the Government and of good judicial administration.

I will endeavor to secure some local lawyer to move my admission pursuant to Rule 2. If that cannot be done expeditiously, then I want this letter to speak as part of the record that "the remedy by motion" (Under rule 32(d) F.R.C.P. and Sec. 2255, Title 28 U.S.C.A.) before the court which imposed the sentence is "inadequate or ineffective."

Very truly yours,

812 Joshua Green Bldg.
Seattle 1, Washington
KD:b
CC: Mr. Theodore Hanson, U.S.District Attorney
Federal Courthouse Building, Juneau, Alaska

Honorable George W. Folta, U. S. District Judge
Federal Courthouse Building, Juneau, Alaska

Honorable Herbert Brownell
Attorney General of the United States, Washington, D. C.

Honorable William J. Langer
Senate Office Building, Washington, D. C.

United States District Court, First Division, Territory of Alaska, Judge's Chambers, Juneau

George W. Folta, Judge.

At Anchorage.

March 27, 1955.

Mr. Floyd O. Davidson,
Attorney at Law,
Box 1108,
Ketchikan, Alaska.

Dear Mr. Davidson:

I have your further letter of March 21st with reference to the Madsen Case.

In view of the circumstances of this case and my concern that the orders made against Simmons and Davis be not circumvented, I shall require that the motion already filed should be supported by showing, 1) that you are not acting for Simmons or Davis—in other words, that they are not acting through you; 2) that you derive your authority solely from Madsen or his father, and, 3) that you are familiar with the contents of the motion and supporting papers and that you adopt them as your own. In this connection, however, I wish to point out that from my recollection of these papers, which are not accessible to me here, it appeared to me as I glanced over them that there were many statements of an impertinent and contemptuous nature. I mention this so that you will be fully apprised of

their character and will be fully aware of what you are adopting.

Very truly yours,

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed April 13, 1955.

United States District Court, Western District of Washington, Northern Division

No. 149

KENNETH GLEN MADSEN,

Petitioner,

vs.

HAROLD H. HINSHAW, the Sheriff of Skagit County, Washington, and WILLIAM B. PARSONS, the United States Marshal for the Western District of Washington, Northern Division, and The Honorable HERBERT BROWNELL, the Attorney General of the United States,

Respondents.

DECISION AND ORDER

Petitioner has applied to this court for a writ of habeas corpus. He alleges that he is presently confined in the Skagit County Jail in Mount Vernon, Washington within the territorial jurisdiction of this court by the Sheriff of Skagit County, Wash-

ington and by the United States Marshal for the Western District of Washington and by the Attorney General of the United States. Petitioner further alleges that on August 6, 1954, when he was sixteen years of age he became involved in an occurrence at Ketchikan, Alaska resulting in indictment by a grand jury sitting for the federal district court of Alaska, Division Number One at Ketchikan charging him with the crime of first degree murder. A copy of the indictment is set forth.

He further alleges certain facts which he claims violated his substantive and procedural rights as guaranteed by the United States constitution. Involved are his alleged denial of representation by counsel of his own choosing and the denial of rights guaranteed by Chapter 3 of Title 51 of the Alaska Compiled Laws Annotated (1949) in that as a minor there was no adequate waiver of jurisdiction by the Justice Court at said place. It is alleged that petitioner was denied counsel by virture of the trial court's arbitrary refusal of permission to petitioner's chosen attorney to participate in his defense on the day the trial was to have begun; that on that day petitioner's father was personally present in court and stated that he could procure other competent counsel for his minor son if given adequate time, that the court refused to grant such time and compelled petitioner to take a pauper's oath, whereupon the court appointed two unwilling attorneys to represent him; that said attorneys were not granted sufficient time in which to prepare his de-

fense; that by reason of all the circumstances petitioner was over-persuaded to make an offer to withdraw his plea of not guilty and to plead guilty to second degree murder; that the proceedings with regard to such change of plea were not proper and that plaintiff has not withdrawn his plea of not guilty.

Petitioner further sets out the judgment and commitment made and entered by the judge on December 7, 1954.

The above embraces the first twenty-one paragraphs of the petition. All of the above claims are stated in much greater detail than are stated herein but I believe that the foregoing is a reasonably accurate, although brief, summary of plaintiff's claims as to the errors of the trial court and of the alleged deprivation of petitioner's constitutional rights.

Paragraph XXII of the petition reads:

> "That petitioner has complied with Section 2255 of Title 28 of the United States Code Annotated, in that he has twice sought relief under that section, by proper and adequate motion, through two different attorneys, but he has arbitrarily been denied the right to even be heard by the trial Court. That Section 2255 has been wholly inadequate and ineffective in petitioner's case. That other matters and circumstances exist which have rendered Section 2255 not only an extreme hardship to petitioner,

but also totally ineffective. In fact Judge Folta has refused to permit petitioner's counsel Davis or Davidson to file his petition to vacate the plea of guilty."

Paragraphs XXIII and XXIV allege that habeas corpus is the only adequate and effective remedy now left to petitioner by which he may correct the manifest injustice of his unlawful and illegal confinement.

There is also filed with the petition certain supporting exhibits. Exhibit "A" includes a motion to withdraw the plea of guilty and to set aside the judgment and for relief under §2255, Title 28 U.S.C. A., with supporting affidavits and data, presumably mailed to Judge Folta, the sentencing court, for filing. It does not appear that such motion was actually filed. The copy of record of the court under certificate of the clerk of the district court for the First Division, Territory of Alaska (Exhibit "B") indicates not. Exhibit "B" is a certified copy of the court records in the Alaska court, which states that it is complete with the exception of the reporter's transcript. Exhibit "C" is a reporter's transcript of the record in the Alaska court duly certified by the reporter. This court also takes judicial notice of the opinion in In re Davis, 128 F. Supp. 283 in which Judge Folta denied Kenneth W. Davis, one of the attorneys for petitioner herein, permission to appear to argue motion to vacate judgment and sentence.

Upon the request of counsel for petitioner for issuance of an order to show cause why the petition for habeas corpus should not be granted the court raised the issue of jurisdiction and called upon the United States Attorney to appear in the matter with respect to the issue of jurisdiction. Thereafter briefs by petitioner and the United States Attorney as to the jurisdiction of this court to consider the petition for habeas corpus have been filed and considered.

The sole issue before the court is one of jurisdiction—namely, can this court under §2255 of Title 28 U.S.C.A. entertain the petition for habeas corpus filed herein?

Petitioner contends "Section 2255 has worked an extreme hardship on petitioner and has been wholly ineffective and inadequate for him to test the legality of his detention, although he has earnestly attempted to comply with its terms." (Petitioner's brief pp. 16-17).

Petitioner also contends "If a prisoner makes a sufficient showing, by proper allegation, that Section 2255 is or would be inadequate or ineffective, in his particular case, he may then seek relief by habeas corpus. The court, in determining whether the allegations are sufficient, may not go outside the record, and must accept all allegations of fact as being true unless they are clearly repudiated by the record." (Petitioner's brief p. 7.)

The court, it may be assumed, is not bound by nor must it accept an allegation "that Section 2255

is or would be inadequate or ineffective" if such allegation is merely a conclusion and not otherwise substantiated by showing or allegation of sufficient facts or circumstances.

The Court of Appeals for the Ninth Circuit has held in Winhoven v. Swope, 195 F. 2d 181:

> "Section 2255 of 28 U.S.C. provides in its last sentence that if a federal prisoner moves under that section to vacate the sentence under which he is held, in which motion he may have effective and adequate relief, and is denied that relief, he cannot thereafter apply for a writ of habeas corpus. 'An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.' We have so held in Jones v. Squier, 9 Cir., 195 F. 2d 179; See United States v. Hayman, 342 U.S. 205, 72 S. Ct. 263."

It must be conceded from the petition and accompanying exhibits herein that petitioner has sought relief under Section 2255 and that the sentencing court has neither yielded nor denied relief.

While it cannot be ascertained with certainty from the record before this court why the sentenc-

ing court in Alaska has allegedly denied petitioner a hearing upon his motion under Section 2255 of Title 28 U.S.C. it would appear that it is because of procedural objections raised by the trial court, more particularly that petitioner is appearing directly or indirectly through legal counsel who have not been admitted to the Alaska court.

In any event, however, the logic of the conclusion of Judge Denman in writing for the Court of Appeals in Winhoven v. Swope, supra, would seem to apply. Therein he states:

> "Winhoven states that he sought the identical relief in his Section 2255 motion that he seeks in his application for the writ. It therefore cannot be said his 'remedy by motion is inadequate or ineffective to test the legality of his detention.' "

This court believes that all the matters claimed by petitioner as defects in the proceedings in the Alaska court can be and should be finally adjudicated by the Alaska court or on appeal therefrom and that this court has no jurisdiction of a habeas corpus proceeding under the facts herein.

Section 2255, Title 28 U.S.C.A. provides, in part:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to im-

pose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. * * *

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Section 2255 has been many times construed and passed upon by the various district courts and circuit courts. It was passed upon and upheld in the case of United States v. Hayman, 342 U.S. 205.

Petitioner contends that the remedy by §2255 is "inadequate or ineffective" under the facts of this case. It would seem to this court that petitioner construes §2255 as meaning that proceedings thereunder are inadequate and ineffective if the sentencing court to whom the motion for relief is

addressed is guilty of some error in failing to allow such petition to be filed or in failing to allow some particular attorney to appear before such court and present such petition and argue the same. A reading of the section shows that such construction is erroneous. It must appear "that the remedy by motion is inadequate or ineffective," in order to give a district court sitting as this district court is situated jurisdiction to entertain a petition for writ of habeas corpus.

Referring again to Winhoven v. Swope, supra, the court stated as to errors of the sentencing court with respect to a motion under §2255:

> "All these claimed errors could have been raised by appeal as similar contentions were considered and decided in the appeal in the Hayman case. That is to say, §2255 afforded Winhoven an adequate and efficient remedy both as to the issues tendered in the motion and as to any error committed in litigating the motion."

In Sorrentino v. Swope, 198 F. 2d 789, a somewhat similar contention to that herein was made and Judge Bone, speaking for the court of appeals, said:

> "The petition of Sorrentino makes plain why he did not rely upon or resort to the provisions of Section 2255. It argued that 'the provisions of Section 2255 * * * are inadequate and ineffective by virtue of the rule of practice pronounced by the Court of Appeals of this

> Circuit; also, the patent unlawfulness of the commitment, being void on its face, makes recourse to the writ of habeas corpus the sole and whole remedy available to your petitioner.'
>
> "The contention just above noted is void of merit."

The third circuit in United States ex rel. Leguillou v. Davis, 212 F. 2d 681, cited and followed the ninth circuit in Winhoven v. Swope, supra, in a case in some respects analogous to the instant case. In holding that exclusive jurisdiction rested with the sentencing court Judge Hastie, writing for the court, stated:

> "The only exception to this rule of supersession which is authorized by the language of Section 2255 occurs when 'the remedy by motion is inadequate or ineffective to test the legality of * * * detention.' But the remedy is not made thus 'inadequate or ineffective' by doubts about its administration in a particular case. Even if a district court should incorrectly dispose of a proper motion under Section 2255, the remedy would be by appeal and not any alternative habeas corpus petition."

If Judge Folta, the sentencing judge, has in any manner failed to accord petitioner any of his rights under §2255 of Title 28 U.S.C. relief must be sought before the court of appeals and not here. This court has no authority to intervene.

It is the decision of the court that this court does not have jurisdiction to entertain the petition and it is ordered that the petition for writ of habeas corpus filed herein be and it is hereby dismissed.

Dated May 6, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed May 6, 1955.

[Title of District Court and Cause.]

MOTION TO RECONSIDER AND AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

To: The District Court of the United States for the Western District of Washington, Northern Division

Comes Now Kenneth Glen Madsen and respectfully moves this Court to reconsider its order of May 6, 1955, and submits this amended petition for a Writ of Habeas Corpus, as follows:

I.

That petitioner incorporates herein, by reference, his original petition for a writ of habeas corpus heretofore filed in Bellingham, Washington with the clerk of the above-entitled Court bearing the same title as above set forth and bearing cause number 149, the same being directed to this Court.

II.

That petitioner alleges that as a matter of law his original petition was sufficient to warrant granting the relief therein prayed for.

III.

That petitioner with more particular reference to paragraph XXII of his original petition alleges the following facts:

That Section 2255 of Title 28 U.S.C.A., is and has been wholly a hardship in the extreme to petitioner. That the remedy by motion under that section is and has been completely inadequate and ineffective to test the legality of petitioner's unlawful detention. That petitioner has sought relief in the trial Court, but, he has been unlawfully, unjustly, and arbitrarily denied the right to be heard by counsel of his own choosing, including Alaska counsel. That the trial Court has capriciously and without warrant foreclosed petitioner three times in his efforts to have counsel of his own choosing represent him in Alaska. That the trial Court has twice arbitrarily and unjustly denied petitioner the right to be represented by counsel of his own choosing, including Alaska counsel, in his efforts to obtain relief under Section 2255 of Title 28, U.S.C.A. That one of petitioner's attorneys has been arbitrarily and unjustly denied the right to even comply with the Alaska Court's rules in regards to admission to practice. That Judge Folta has openly displayed his feelings and his inability to sit as an impartial jurist, and has, in the published opinion of In Re

Davis, 128 Fed. Supp. 283, judicially declared, without evidence, that petitioner

> "deliberately provoked an altercation with the deceased, who was with his own party, then drove to Ketchikan, armed himself with a pistol, and returned to the scene. He pistol-whipped a teen-ager in the front seat of the car into insensibility, and shot and killed the other, who was apparently asleep in the rear seat."

That this Court, in its decision and order of May 6, 1955, has stated:

> "It must be conceded from the petition and accompanying exhibits herein that petitioner has sought relief under Section 2255 and that the sentencing court has neither yielded nor denied relief."

That petitioner is not obliged to sit back and rely on a Federal Judge to act in his behalf when such Federal Judge has displayed personal anger and meted out continuous injustice to petitioner in all matters concerning petitioner which have directly or indirectly come within his judicial reach. That petitioner alleges there are many other existing facts and special circumstances which deprive him of an opportunity and capacity to fairly or otherwise seek relief under Section 2255. Petitioner alleges that such other existing facts and special circumstances alone entitle him to a hearing, and that the United States Supreme Court in the case of Palmer v. Ashe 72 S. Ct. 191, 342 U.S. 134 (1951)

has so held. That petitioner alleges that Judge Folta has illegally, unjustly, and arbitrarily ordered his court clerk not to file petitioner's motion for relief under Section 2255, and that Judge Folta has capriciously and unlawfully refused to entertain petitioner's motion under Section 2255. That no order granting or denying petitioner relief under Section 2255 has been or will be entered by Judge Folta, because Judge Folta is totally prejudiced against petitioner and unwilling and unable to act fairly and independently of his personal feelings in anything or any cause concerning petitioner. That petitioner cannot appeal to the Court of Appeals of the Ninth Circuit as suggested in this Court's opinion of May 6, 1955, because there has been no order entered and will be no order entered by Judge Folta from which an appeal could be taken. Petitioner is stymied. The futility of appeal under such circumstances is illustrated in Besselman v. City of Moses Lake 146 Washington Decisions 261 (1955). That petitioner is spending time in confinement under an illegal sentence and that the only adequate and effective remedy to test the legality of his detention and restore his liberty is Habeas Corpus.

J. LAEL SIMMONS
KENNETH DAVIS, and
WM. H. SIMMONS,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed May 10, 1955.

[Title of District Court and Cause.]

MEMORANDUM DECISION AND ORDER DENYING MOTION TO RECONSIDER AND DISMISSING AMENDED PETITION

Petitioner has filed a further pleading in the above-entitled matter captioned "Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus." In connection herewith he has also filed "Petitioner's Third Memorandum of Authorities" and "Second Request of Kenneth Glen Madsen, Petitioner."

On May 6, 1955, this court signed and filed a written decision and order of dismissal wherein for reasons set forth the court concluded it was without jurisdiction to entertain the petition and dismissed it.

Passing the question of whether petitioner's "Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus" is properly before the court inasmuch as petitioner has indicated he will seek relief from a higher court if he is denied a hearing on his petition it appears advisable to consider said motion and amended petition on its merits.

Paragraph I of the amended petition incorporates by reference the original petition.

Paragraph II alleges the sufficiency of the original petition.

Paragraph III amplifies Paragraph XXII of the original petition by alleging certain matters. In substance, most of the allegations contained in Paragraph III of the amended petition restate alleged facts and accusations set forth or appearing in the original petition and accompanying exhibits.

In addition reference is made to Judge Folta's published opinion appearing in 128 F. Supp. 283 and to this court's decision and order of May 6, 1955. Also petitioner alleges in said Paragraph III "that Judge Folta has illegally, unjustly, and arbitrarily ordered his court clerk not to file petitioner's motion for relief under Section 2255, and that Judge Folta has capriciously and unlawfully refused to entertain petitioner's motion under Section 2255." The concluding portion of said Paragraph III includes the following statement: "That petitioner cannot appeal to the Court of Appeals of the Ninth Circuit as suggested in this Court's opinion of May 6, 1955, because there has been no order entered and will be no order entered by Judge Folta from which an appeal could be taken. Petitioner is stymied."

It is the opinion of the court that the amended petition contains no additional allegations of fact that would serve to give this court jurisdiction and the decision and order heretofore filed on May 6, 1955, is affirmed.

Referring to the allegation as to Judge Folta's actions with respect to petitioner's motion for relief under §2255, Judge Hastie's language in United

States v. Davis, 212 F. 2d 681 cited in this court's earlier decision is pertinent:

> "Even if a district court should incorrectly dispose of a proper motion under Section 2255, the remedy would be by appeal and not any alternative habeas corpus petition."

It is stated by petitioner he cannot appeal to the Court of Appeals of the Ninth Circuit because there has been no order entered by Judge Folta in the Alaska proceeding under §2255. 28 U.S.C.A. §1651 would appear to authorize procedure whereby petitioner may be granted relief from a higher court should he make sufficient showing with respect to the Alaska proceeding.

Counsel for petitioner in petitioner's third memorandum of authorities state "Section 2255 of Title 28 U.S.C.A., is not applicable to petitioner's case, as he has been adjudged guilty under Territorial Law and sentenced by a Territorial Court, and not a United States District Court. The same reasoning applies as in cases where a prisoner has been convicted under State Law, and sentenced by a judge of a State Court."

The first paragraph of Section 2255 provides as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law,

or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." (Emphasis supplied.)

Paragraph XXI of the original petition sets forth the judgment and commitment under which petitioner is now imprisoned as a federal prisoner. See also Exhibits "B" and "C."

Petitioner's contention might have been worthy of consideration prior to the amendment of Section 2255 on May 24, 1949. His position is without merit as the statute is now worded. See Burke v. United States, 103 A. 2d 347.

Petitioner's motion for reconsideration and amended petition for writ of habeas corpus is hereby denied and dismissed.

Dated May 25, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Harold H. Hinshaw the Sheriff of Skagit County, Washington, and William B. Parsons the United States Marshal for the Western District of Washington, Northern Division, and The Honorable Herbert Brownell the Attorney General of the United States, and the District Court of the United States for the Western District of Washington, Northern Division.

You and Each of You Are Hereby Notified that the above-named petitioner, Kenneth Glen Madsen, feeling himself aggrieved, does hereby give this notice of appeal, and says:

That he will appeal from the Memorandum Decision and Order Denying Motion to Reconsider and Dismissing Amended Petition, heretofore rendered in these proceedings on May 25, 1955, by the Honorable William J. Lindberg, Judge of the above-entitled Court, and that said appeal will be taken to the United States Court of Appeals for the Ninth Circuit.

Dated at Seattle, Washington this 21st day of June, 1955.

J. LAEL SIMMONS,
KENNETH DAVIS, and
WM. H. SIMMONS,
Attorneys for Petitioner.

Received June 21, 1955.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the undersigned, Floyd Madsen, father of Petitioner, in the above-entitled action, as principal and National Surety Corporation, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the United States for the benefit of whomsoever it may concern in the penal sum of Two Hundred and Fifty Dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and the said surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and sealed at Seattle this 16th day of June, 1955.

Whereas, on the twenty-fifth day of May, 1955, the above-entitled court rendered and entered a decision and order in the above-entitled cause denying petitioner's motion to reconsider and dismissing petitioner's amended petition for a writ of habeas corpus;

And Whereas, the above-named petitioner, feeling aggrieved by said decision and order and desiring to appeal from the same to the United States Court

of Appeals for the Ninth Circuit; and perfect said appeal by this bond.

Now, Therefore, the Condition of the above obligation is such, that if Floyd Madsen will pay all costs and damages that may be awarded against Petitioner on said appeal or on the dismissal thereof, not exceeding Two Hundred and Fifty ($250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

FLOYD MADSEN,

By /s/ WM. H. SIMMONS,
One of His Attorneys.

[Seal] NATIONAL SURETY CORPORATION,

By /s/ MILDRED PALITZKE,
Attorney-In-Fact.

Received June 21, 1955.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ALL EXHIBITS TO COURT OF APPEALS

This matter having come on duly and regularly this day, before the undersigned Judge of this Court, upon the oral motion of Wm. H. Simmons, one of petitioner's (appellant's) attorneys herein, for an order directing the clerk of this court to transmit all exhibits heretofore filed in these proceedings to the clerk of the Court of Appeals for

the Ninth Circuit, as part of the record on appeal, and this Court being thoroughly and judicially advised in and of the premises, makes the following order:

Ordered that the clerk of this Court transfer to the clerk of the Court of Appeals for the Ninth Circuit, as part of the record on appeal, all exhibits heretofore filed in these proceedings which constitute petitioner's exhibits "B," "C," and "D," if and when petitioner files his notice of appeal and cost bond.

Done in Open Court this 21st day of June, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ WM. H. SIMMONS,
One of Petitioner's Attorneys.

Received June 21, 1955.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, and designation of counsel, I am transmitting herewith the following original documents and papers in the file dealing with the above cause as the record on appeal herein from the Memorandum Decision and Order Denying Motion to Reconsider and Dismissing Amended Petition rendered May 25, 1955, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Petition for a Writ of Habeas Corpus, including Exhibit "A," filed April 13, 1955.

2. Exhibit "B," consisting of transcript of Court record in Ketchikan, Alaska, filed April 13, 1955.

3. Exhibit "C," consisting of Reporter's transcript of record, filed April 13, 1955.

7. Exhibit "D," consisting of photostatic copy of letter to Judge Folta, filed April 26, 1955.

9. Decision and Order, filed May 6, 1955.

10. Motion to Reconsider and Amended Petition for Writ of Habeas Corpus, filed May 10, 1955.

13. Memorandum Decision and Order Denying Motion to Reconsider and Dismissing Amended Petition, filed May 26, 1955.

14. Notice of Appeal, filed June 22, 1955.

15. Cost Bond on Appeal, filed June 22, 1955.

16. Appellant's Designation of Certain Portions of the Record as Record on Appeal, filed June 22, 1955.

17. Order for Transfer of All Exhibits to Court of Appeals, filed June 22, 1955.

18. Statement of Points Relied Upon on Appeal, filed June 22, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, $5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 16th day of July, 1955.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ MARJORIE J. EDQUIST,
Deputy Clerk.

[Endorsed]: No. 14833. United States Court of Appeals for the Ninth Circuit. Kenneth Glen Madsen, Appellant, vs. Harold H. Hinshaw, Sheriff of Skagit County, Washington; William B. Parsons, United States Marshal for the Western District of Washington; and Honorable Herbert Brownell, Attorney General of the United States, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 22, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.